IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 515

UNITED STATES,

Petitioner,

—v.—

SOUTHERN UTE TRIBE OR BAND OF INDIANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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DOCKET—INDIAN CLAIMS COMMISSION

FILINGS—PROCEEDINGS—APPEARANCES

Contract No. 167 Docket No. 328

SOUTHERN UTE TRIBE OR BAND OF INDIANS

Attorney of Record:

ERNEST L. WILKINSON
National Grange Bldg., 9th Floor
1616 H St. N. W.
Washington 6, D. C.

* * * *

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Date filed	
Aug. 10, 1951	20 copies of petition filed, with ack. of service.
	* * * *
May 29, 1956	Answer filed.
Jun. 22, 1956	Motion for limited summary judgment as to 2nd & 3rd defenses filed by claimant.
	* * * *
Nov. 4, 1960	Order overruling motion for limited S.J. alternatively motion to strike the "second defense" and the "third defense" (J-774)
	* * * *
May 17, 1963	Petitioner's proposed exhibits 1 through 22.
May 20, 1963	Dfnt's proposed exhibits 1 through 18.
May 20, 1963	Dfnt's proposed exhibit No. 19 (Supplement).
June 12, 1963	Petitioner's Exceptions to Dfnt's Accounting.
	* * * *
Sept. 30, 1963	Ptr's First Amendment to Exceptions to Defendant's Accounting.

Date filed	
Oct. 3, 1963	Dfnt's proposed rebuttal exhibits 14a, 14b, 20 and 21.
	* * * *
Oct. 29, 1963	Transcript of hearing held Oct. 8, 9, 1963. (pp. 1-184). (Ipp 1-184)
	* * * *
Feb. 18, 1964	Ptr's Proposed Findings of Fact conclusions of Law and Brief on *Liability*
	* * * *
Aug. 11, 1964	Dfnt's Requested Findings of Fact, Objections and Brief on *Liability*.
	* * * *
Sept. 9, 1964	Ptr's Objections to Dfnt's Findings of Fact and *REPLY BRIEF*.
Sept. 14, 1965	Ptr's motion for leave to file additional exhibit No. 27.
Sept. 17, 1965	Order admitting additional evidence, Ptr's Exhibit 27. (J-1027).
Sept. 23, 1965	Ptr's Exhibit 28 (GAO Report) received in evidence at hearing this date.
Nov. 1, 1965	Ptr's Supplemental Memorandum re Accounting Issues.
	* * * *
Nov. 8, 1965	Dfnt's Response to Ptr's Supplemental Memorandum re accounting issues.
Nov. 8, 1965	Transcript of Argument, which was held Sept. 23, 1965. (pp 1-66).
	* * * *
May 6, 1966	First Interlocutory Order and Opinion of the Commission. *Findings of Fact*
Aug. 4, 1966	Defendant's Notice of Appeal from the Interlocutory order of the Indian Claims Commission filed May 6, 1966, determining liability. Copy of Appeal sent to Wilkinson Firm.

Date filed	
Sept. 1, 1966	Receipt from the U. S. Court of Claims on Record on Appeal.
	* * * *
Oct. 24, 1966	Supplemental Record on Appeal sent to U. S. Court of Claims.
May 16, 1967	Order dated May 15th, 1967 from the U. S. Court of Claims remanding case to the Indian Claims Commission with instructions to hear additional evidence and to make and report to the U. S. Court of Claims Findings of Fact.
Oct. 16, 1967	Order from the United States court of Claims denying appellant's motion for rehearing and appellee's motion to vacate order of remand.
Mar. 20, 1968	Petitioner's Motion for an Order calling on the Department of Justice to produce documents.
Mar. 22, 1968	Supplement to Defendant's Digest of Exhibits and Defendant's Exhibits 22 and 23.
	* * * *
Apr. 15, 1968	Motion of Defnt's Objections to Ptr's Motion for order calling on the Department of Justice to Produce Documents.
Apr. 17, 1968	Order Requiring Production of Documents and Instituting Investigation.
Apr. 22, 1968	Transcript of hearing on Argument held April 17, 1968, 1 Vol.
	* * * *
May 2, 1968	Commission's Order admitting affidavit in evidence subject to cross-examination of affiant by the parties. (J-1108)
May 24, 1968	Certificate of Counsel and Digest of Pertinent Material from Case No. 46640 Submitted by W. Braxton Miller from Justice Dept.

Date filed	
May 24, 1968	Response of Dfnt's to Order of the Commission Requiring Production of Documents and Instituting Investigation.
Nov. 7, 1968	Ptr's Proposed Additional Findings of Fact submitted.
Dec. 16, 1968	Dfnt's Request for Additional Findings of Fact under special Order of the Court of Claims, Objections to Findings Proposed by Petitioner and Brief.
	* * * *
Feb. 7, 1969	Ptr's Objections to Dfnt's Requested Findings of Fact and Reply to Objections.
June 27, 1969	ADDITIONAL FINDINGS OF FACT and ORDER TRANSMITTING FINDINGS OF FACT TO THE COURT OF CLAIMS.
	* * * *

THE UNITED STATES

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS

Appeal from the Indian Claims Commission, Dkt. No. 328

For Pltf.:

GLEN A. WILKINSON
1616 H Street, N. W.
Washington, D. C. 20006
Atty. of Appellee

For U. S.:

W. BRAXTON MILLER
For Appellant

Petition Filed Aug. 26, 1966

Date	Proceedings
Aug. 26, 1966	Record on appeal from the Indian Claims Commission filed. (Ind. Cls. Dkt. No. 328). Parties notified. (Appeal by U. S., No. fee).
Oct. 24, 1966	Brief of United States (Appellant) filed. Copies (10) to appellee.
Oct. 26, 1966	Supplement to Record on Appeal filed. Parties notified.
	* * * *
Dec. 30, 1966	Appellee's brief filed. Copies (10) to appellant.
	* * * *
Feb. 9, 1967	Appellant's reply brief filed. Copies (10) to appellee.
May 1, 1967	Argued and submitted on appeal.

Date	Proceedings
May 15, 1967	Court entered order remanding the case to the Indian Claims Commission with instructions at set forth in the order. Copy to parties and to Indian Claims Commission.
June 13, 1967	Appellant's motion for rehearing filed. Copies (2) to atty.
June 14, 1967	Appellee's motion to vacate order of remand filed. Copy to appellant.
June 29, 1967	Appellant's response to appellee's motion to vacate filed. Copies (2) to appellee.
Oct. 9, 1967	Court entered order denying appellant's motion for rehearing and appellee's motion to vacate order of remand and deleting and vacating words and punctuation appearing in the order entered May 15, 1967, as set forth therein. Copy to parties and to Indian Claims Commission.
July 17, 1969	Additional findings of fact of Indian Claims Commission filed by Clerk of the Commission. Parties notified.
Sept. 4, 1969	Appellant's motion to set case for additional argument filed. Copies (4) to appellee. ALLOWED SEP 15 1969 and set for argument on the November, 1969, calendar.
	* * * *
Sept. 11, 1969	Appellee's response to motion to set case for additional argument filed. Copies (3) to appellant.
Sept. 16, 1969	Appellee's motion for leave to file supplemental citations of authority filed. Copies (3) to appellant. ALLOWED SEP 30 1969.
Sept. 30, 1969	Appellee's supplemental citations of authority filed. Copies (3) to appellant.

Date	Proceedings
Oct. 21, 1969	Supplemental record on appeal (contained in one accordian-type envelope) filed. Notice to parties.
Nov. 3, 1969	Argued and submitted on appeal from the Indian Claims Commission. Notice to I.C.C.
Mar. 20, 1970	The decision of the Indian Claims Commission is affirmed as to the taking claim and as to the accounting claim, with the exception set forth in the opinion, and the case is remanded to the Commission for approval of the amount of compensation due in accordance with the opinion. Opinion by Judge Nichols. Dissenting opinions by Judge Skelton and Chief Judge Cowen.
May 28, 1970	Appellant's request for writ of certiorari filed. Copies (5) to appellee.
Aug. 12, 1970	Notice of filing in the Supreme Court of the United States of petition for certiorari on August 10, 1970, No. 515, October Term, 1970. Notice to I.C.C.
Nov. 19, 1970	Order of the Supreme Court dated November 16, 1970 allowing certiorari filed. (Request for transmittal of record contained in covering letter from Supreme Court Clerk).
Nov. 25, 1970	Record in re certiorari forwarded to Clerk, Supreme Court of the United States. (No fee—U.S.)

[Title Omitted in Printing]

BEFORE THE INDIAN CLAIMS COMMISSION

No.

SOUTHERN UTE TRIBE OR BAND OF INDIANS, PETITIONER

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

PETITION

Petitioner, the Southern Ute Tribe or Band of Indians, respectfully represents:

1. *Petitioner:* The petitioner is a tribe or band of Indians maintaining an organization known and recognized by defendant as the Southern Ute Tribe of the Southern Ute Reservation, whose members reside generally on the Southern Ute Reservation in Colorado.

2. *Statutory Authority for Suit:* This petition is filed under and pursuant to the Act of August 13, 1946 (60 Stat. 1049), conferring jurisdiction on the Indian Claims Commission to hear and adjudicate claims of tribes, bands or identifiable groups of American Indians against the United States, and the claims herein are asserted under Section 2 of said act.

3. *Attorneys' Contract:* Petitioner has entered into a contract with Wilkinson, Boyden & Cragun, a law partnership composed of Ernest L. Wilkinson, John S. Boyden, John W. Cragun and Glen A. Wilkinson, to prosecute its claims against the United States, which contract has been duly approved by the Commissioner of Indian Affairs, for and in behalf of himself and the Secretary of the Interior, as required by law, and is in full force and effect.

4. *Claims Not Pending:* No claim asserted herein, nor any part thereof, is included in any suit pending in the

Court of Claims or in the Supreme Court of the United States, and no claim asserted herein, nor any part thereof, has been filed in the Court of Claims under legislation in effect August 13, 1946, the date of approval of the Indian Claims Commission Act.

5. *Petitioner Sole Owner of Claim:* Petitioner is and always has been the sole and absolute owner of the claims asserted herein and no person or persons other than petitioner has ever had any interest therein. No assignment or transfer of any claim or claims set out herein, nor of any interest therein, has been made. Petitioner has not been paid for any claim or claims asserted nor any part thereof, except as hereinafter set forth, and is justly entitled to recover therefor from the United States, after the allowance of any credits or set-offs.

6. *Defendant Owes Fiduciary Duty:* At all times mentioned in this petition, defendant was the guardian and trustee of the property and affairs of the petitioner; as such defendant was subject to a high degree of fiduciary obligation and was required to deal fairly and honorably with petitioner, its property and property rights.

7. *Prior Action by Congress:* No action has been taken by Congress, nor by any of the departments of defendant, with respect to the claims herein asserted, except that Congress by Act of August 13, 1946 (60 Stat. 1049) provided a forum for the litigation of said claims.

8. *Unlawful Disposal of Land and Failure to Account:*

a. By Act of Congress of June 15, 1880 (21 Stat. 199), the Confederated Bands of Ute Indians, which included petitioner, ceded to the United States "all the territory of the present Ute Reservation in Colorado," composed of nearly 16,000,000 acres of land, except "the unoccupied agricultural lands on the La Plata River" on which members of the petitioner agreed to "remove and settle" and which was to constitute a reservation for petitioner.

b. By Section 3 of the Act of Congress of February 20, 1895 (28 Stat. 676), the reservation promised to petitioner by the Act of June 15, 1880, *supra*, was described as follows:

"* * * there shall be, and is hereby, set apart and reserved all that portion of their present reservation lying west of the range line between ranges thirteen and fourteen west of the New Mexico principal meridian, and also all of townships thirty-one and thirty-two of ranges fourteen, fiteen, and sixteen west of the New Mexico principal meridian and lying in the Territory of New Mexico, subject, however, to the right of the Government to erect and maintain agency buildings thereon and to grant rights of way through the same for railroads, irrigation ditches, highways, and other necessary purposes; and the Government shall maintain an agency at some suitable place on said lands so reserved."

c. The reservation described in paragraph 8b contained approximately 1,075,000 acres. By proclamation of the President of April 13, 1899 (31 Stat. 1947), in accordance with the provisions of the Act of February 20, 1895, *supra*, approximately 523,079 acres of that reservation were opened to settlement and disposal under the public land laws, and approximately 157,641 acres were set aside in a schedule of legal descriptions thereto attached for the selection of allotments by the Indians. The approximately 523,079 acres opened to settlement and disposal are described in said proclamation as follows:

"* * * Beginning at the point established by S. S. Gannett, Special Indian Agent, in June, 1897, at the intersection of the 107th meridian and the 37th parallel of latitude; thence north 15 miles along the eastern boundary of the reservation; thence westerly along the north boundary of the Southern Ute Indian Reservation to its intersection with the range line between ranges thirteen and fourteen west of the New Mexico Principal Meridian; thence south fifteen miles on said range line to the south boundary of the State of Colorado; thence easterly along the south boundary of the State of Colorado to the place of beginning."

Under the Act of February 20, 1895, *supra*, the lands within the area so described could be disposed of under the desert, homestead and townsite laws and under the coal, mineral, stone and timber laws, except that no homestead settlers should receive title to any portion of such lands at less than $1.25 per acre.

d. Under the Act of February 20, 1895, *supra*, from the moneys realized from the sale of said lands, there was to be paid to the Indians in the manner provided therein the sum of $50,000; an additional $20,000 was to be invested in sheep to be divided per capita among the Indians; an additional $2,000 was to be paid to certain chiefs of the tribes and "the balance of the money realized from the sale of the lands, after deducting expenses of sale and survey," was to "be held in the Treasury of the United States in trust for the sole use and benefit of said Southern Ute Indians."

e. Purporting to act under the authority of the aforesaid acts and proclamation, or otherwise, defendant thereafter unlawfully disposed of the following acreages of land, comprised within the area of the approximately 523,079 acres referred to in paragraph 8c hereof, for which petitioner is informed defendant received no compensation and consequently made no accounting to petitioner:

Free Homesteads	219,037.39 acres, more or less
Soldiers' Additional Homesteads	480.51 acres, more or less
Other Reservations of Land	360.00 acres, more or less
Homestead Applications	617.27 acres, more or less
	220,495.17 acres, more or less

f. In addition, defendant has disposed of the following acreages of land comprised within the area of the approximately 523,079 acres enumerated in paragraph 8c hereof, for which petitioner is informed defendant received proceeds in an amount unknown to petitioner but known to defendant, of which defendant has made no accounting to petitioner:

Desert Entries	45,452.43 acres, more or less
Timber and Stone Entries	18,203.78 acres, more or less
Cash Entries	16,340.59 acres, more or less
Isolated Tracts	1,407.87 acres, more or less
Public Sales	468.51 acres, more or less
Coal Cash Entries	80.00 acres, more or less
	81,953.18 acres, more or less

g. From the approximately 157,641 acres referred to in paragraph 8c hereof (set aside for allotments), approximately 63,045.61 acres were allotted to the Indians, leaving approximately 94,596.39 acres unallotted.

h. From the approximately 523,079 acres referred to in paragraph 8c hereof (set aside for settlement and disposal under the public land laws), approximately 220,630 acres were not sold or entered under the public land laws.

i. By an order of the Secretary of the Interior of September 14, 1936, acting under authority of Section 3 of the Act of June 18, 1934 (48 Stat. 984), all the unallotted and undisposed of lands offered for settlement and entry, containing approximately 315,227 acres, were restored to and made part of the Southern Ute Reservation.

9. *Damages:*

a. The disposal of the approximately 220,495.17 acres of land by defendant was in violation of the Acts of June 15, 1880 and February 20, 1895, and the proclamation of the President of April 13, 1899 constituted a taking of said land, resulting in damage to petitioner in an amount equivalent to the value of said land at the time of taking together with a sum sufficient to compensate petitioner for the damage resulting from the delay in payment.

b. The disposal of the approximately 220,495.17 acres of land by defendant, contrary to the aforesaid statutes and proclamation, constituted unfair and dishonorable conduct on the part of defendant and caused damage to petitioner in an amount equivalent to the value of said land at the time of taking together with a sum sufficient to compensate petitioner for the damage resulting from the delay in payment.

c. Defendant's failure to account for the proceeds from approximately 81,953.18 acres disposed of as set forth in paragraph 8f was in violation of the aforesaid statutes and proclamation and the obligation imposed upon a trustee, and caused damage to petitioner in an amount equal to that received by defendant, which amount is unknown to petitioner, but is known to defendant.

d. Defendant's failure to account for the proceeds from the sale of approximately 81,953.18 acres constituted unfair and dishonorable conduct on the part of defendant, and caused damage to petitioner in an amount equal to that received by defendant, which amount is unknown to petitioner, but is known to defendant.

10. WHEREFORE, petitioner prays that judgment be awarded to it under categories (1), (3) and (5) of Section 2 of the Act of August 13, 1946, *supra*, for an amount which will provide fair and just compensation for the approximately 220,495.17 acres of land unlawfully disposed of by defendant, and that defendant be required to render a true, complete and proper accounting for the proceeds received by it from the disposal of the approximately 81,953.18 acres of land, less any proper credits or set-offs, and for such other and further relief as the Commission may deem fair and equitable.

Respectfully submitted,

ERNEST L. WILKINSON,
Attorney of Record,
744 Jackson Place, N.W.,
Washington 6, D. C.

FRANCIS M. GOODWIN,
JOHN W. CRAGUN,
GLEN A. WILKINSON,
Of Counsel.

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* * * *

ANSWER

Comes now the defendant, by its Assistant Attorney General, and for its answer to the petition filed herein, alleges and states as follows:

First Defense

1. The petition fails to state a claim upon which relief can be granted.

Second Defense

2. Each and every of the claims and causes of action set out in the petition have been adjudicated by final judgments of the Court of Claims as hereafter set out.

3. In Court of Claims case No. 30360, decided May 23, 1910 (45 C. Cls. 440, 453, 471), the Ute Indians, including petitioner's predecessors in interest, were awarded the net sum of $3,408,611.40 as the proceeds of all cash sales and the value of lands reserved for public uses from the lands ceded under the Agreement of June 15, 1880, up to July 1, 1908. The parties plaintiff to that action are set out in the Court's Finding I (45 C. Cls. pp. 442-443), and that the lands there involved included the lands complained of in the petition herein appears from the Court's Findings IV-V (pp. 445-449) and from the construction of the Agreement of June 15, 1880 (21 Stat. 199), and subsidiary agreements and acts, in the opinion of the Court (pp. 456-461). The accounting in case No. 30360 was extended to June 30, 1910, by decision of the Court of Claims of February 13, 1911 (46 C. Cls. 225).

4(a). Thereafter Sections 1 and 6 of the Act of June 28, 1938 (52 Stat. 1209), as amended, authorized and virtually directed the Court of Claims to adjudicate all remaining claims on the part of the Ute Indians, or any tribe or band thereof, including compensation for any lands formerly belonging to said bands of Ute Indians, or any of them, taken by the United States without compensation or disposed of in any manner whereby the said

Indians were deprived of the use and benefits of such lands.

(b). The exhaustive investigation and prosecution of all valid claims under this act, including all possible claims arising out of the transactions alleged in the petition herein, are summarized in the decision of the Court of Claims awarding attorneys' fees in the *Confederated Bands of Ute Indians* v. *The United States*, decided November 6, 1951 (120 C. Cls. 609, Fdgs. 23-28, pp. 621-627). Judgments in decided cases, totaling over $31,000,000, are listed in finding 1 (p. 610) and the issues involved are analyzed in findings 47-69 (pp. 635-648).

5(a). Cases numbered 45585, 46640, 47564 and 47566 all terminated in simultaneous judgments on stipulations entered July 13, 1950 (117 C. Cls. 433-440) in favor of plaintiffs, including petitioner herein.

(b). The stipulation for final judgment and the final judgment entered in Court of Claims case No. 46640 (117 C. Cls. 436-438) are specifically pleaded as a bar and estoppel to the claims asserted in the petition. Case No. 46640 was filed October 15, 1945. The petition was amended March 19, 1947, and the cause was prosecuted under the Act of June 28, 1938, as amended, and under the pertinent sections of the Indian Claims Commission Act.

(c) The stipulation provided for a net judgment, after all allowable offsets, of over $6,000,000.00, for the complete extinguishment of plaintiffs' right, title, interest, estate, claims and demands of whatsoever nature in and to the land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880, which the United States had sold for cash between July 1, 1910, and June 28, 1938, disposed of as free homesteads from December 19, 1885, to June 28, 1938, and set aside for public purposes during the period June 30, 1910, to June 27, 1938. The stipulation provides:

> * * * So far as the parties with diligence have been able to determine these descriptions represent all the land so disposed of and set aside. However, the judgment to be entered in this case is *res judicata*,

> not only as to the land described in Schedule 1, but, whether included therein or not, also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and by the defendant during the aforesaid periods of time sold for cash, disposed of as free homesteads and set aside for public purposes. * * *

The matter of division and distribution of the judgment among the several bands, which included petitioner, was reserved.

Third Defense

6. There is a fatal defect of parties plaintiff as hereafter set out.

7. As appears from the second defense, the bands or tribes of Ute Indians which joined in the Agreement ratified by the Act of June 15, 1880, are real and necessary parties in interest to the claims asserted in the petition.

8. The "Southern Utes," referred to in the Agreement of 1880 and at all times subsequent thereto down to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), consisted of the Capote, Muache and Weeminuche Bands of Ute Indians. The "Southern Utes," as so used, are now divided into the Southern Ute Tribe, petitioner herein, and the Ute Mountain Tribe (100 C. Cls. p. 415). The Ute Mountain Tribe or Band has an interest in the subject matter of the claims asserted in the petition and is a necessary party to this proceeding.

Fourth Defense

9. The allegations of paragraph 1 of the petition are denied, except it is admitted that petitioner is now an organization or association known and recognized under the name of Southern Ute Tribe of the Southern Ute Reservation.

10. The allegations of paragraph 2 of the petition are admitted, except that it is denied that the claims set out

in the petition are maintainable under Section 2 of the Indian Claims Commission Act.

11. The allegations of paragraph 3 of the petition are admitted to the extent that they are supported by the copy of said contract on file with this Commission and by the original thereof.

12. The allegations of paragraph 4 of the petition constitute a negative pregnant and, as such, an admission that the claims, in whole or in part asserted in the petition, have been included in suits not pending, but determined in the Court of Claims or in the Supreme Court of the United States and that said claims have been filed in the Court of Claims under legislation not in effect on August 13, 1946. As appears in defendant's second defense, the admission is substantially correct, except that by amendment the authorizing act for previous cases was extended through August 13, 1946.

13. The allegations of paragraph 5 of the petition are denied.

14. Paragraph 6 of the petition states a conclusion of law, which requires neither admission nor denial.

15. The allegations of paragraph 7 of the petition are denied.

16(a). The allegations of paragraphs 8a through 8g of the petition are contrary to the findings and opinions of the Court of Claims in cases No. 30360 (45 C. Cls. pp. 445-449, 454-455, 456-461) and No. 45585, decided October 4, 1943 (100 C. Cls. 413, 415-418) and are denied, except as stated in said cases and as appear in the related public acts and documents.

(b). In response to paragraphs 8h and 8i of the petition, it is admitted that certain unallotted and undisposed of lands were returned to tribal ownership as set out in the Order of the Secretary of the Interior of September 14, 1936 (5 Kappler 659), and all other allegations are denied.

17. The allegations of paragraphs 9a through 9d of the petition are denied on the basis of the adjudications of the Court of Claims heretofore pleaded in defendant's second defense and more particularly case No. 30360 and case No. 46640.

Fifth Defense

18. Defendant says that it has from time to time, although under no obligations to do so, expended on behalf of petitioner and petitioner's predecessors in interest various sums of money out of gratuity appropriations, that accountings have been previously made therefor in the various Court of Claims actions hereinbefore alleged, but if liability is adjudged said accountings may have to be re-examined and restated and will therefore be subsequently set forth by an amendment hereto pursuant to Rule 12 of this Commission, if it should be determined that the defendant is liable to petitioner in any amount.

19. While at all times asserting that petitioner has no interest in and to the subject matter of the several claims set forth in the petition filed herein and that said claims are not actionable, defendant further alleges that, if any sum should be found to be due by this Commission, petitioner is not entitled to any interest thereon.

WHEREFORE, having fully answered the petition this defendant prays:

1. That this cause be set down for preliminary hearing on the question of liability, and
2. That the petition be dismissed and the petitioner recover nothing from the defendant.

PERRY W. MORTON,
Assistant Attorney General.

W. BRAXTON MILLER,
Attorney for Defendant.

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* * * *

PETITIONER'S EXCEPTIONS TO DEFENDANT'S ACCOUNTING

Petitioner, the Southern Ute Tribe or Band of Indians, takes exception to defendant's accounting in this proceeding in the following respects:

1. Petitioner excepts to any delay of more than 30 days in covering any of petitioner's interest-bearing moneys into the United States Treasury after they had been received by defendant's agents, and to the failure of defendant to account for interest lost to petitioner through any delay of more than 30 days in depositing moneys in interest-bearing accounts.

2. Petitioner excepts to the failure of defendant to disclose the length of time during which petitioner's moneys were withdrawn from interest-bearing accounts and held in noninterest-bearing status before the moneys so withdrawn were expended by defendant's agents or restored to interest-bearing status, and to show the amount of interest lost to petitioner while its moneys were held in noninterest-bearing status.

3. Petitioner excepts to the failure of defendant to credit interest at the rate of 5% on petitioner's tribal fund: "Proceeds of Southern Ute Reservation" and the failure to show the amount of interest lost to petitioner through the failure to credit the fund with interest as required by law.

4. Petitioner excepts to the erroneous transfer from its fund "Proceeds of Southern Ute Reservation" of $193.25 to the "Confederated Bands of Utes 4% Fund", and to the failure of defendant to account for the interest lost to petitioner as a result of the erroneous transfer.

5. Petitioner excepts to the erroneous transfer from its fund "Interest on Proceeds of Southern Ute Reservation" of $800.00 to the fund "Interest on Ute 5% Fund, Southern Ute".

6. Petitioner excepts to the use of its tribal funds for all agency, educational and other expenses which were

obligations of defendant, and to the failure of defendant to disclose (a) the amount of petitioner's tribal funds expended for obligations of the defendant and (b) the amount of interest lost to petitioners as a result of this improper use of its funds. The purposes for which petitioner's funds were used, which appear on their face to be improper as a use of trust funds to discharge the defendant's personal obligations, are listed as follows (GAO Rept., pp. 19-27, 28-36):

Agency buildings and repairs
Agricultural aid
Agricultural implements and equipment
Automobiles, vehicles, maintenance and repairs
Clothing
Development of Oxford tract
Fuel, light, water and sewage
Exhibit hall
Hardware, glass, oils and paints
Household equipment and supplies
Livestock
Maintaining law and order
Medical expenses
Mills and shops
Miscellaneous agency expenses
Miscellaneous building material
Operation of coal mine
Pay of carpenters
Pay of clerks
Pay of farmers
Pay of teamsters
Pay of truck drivers
Pay of herders and stockmen
Pay of interpreters
Pay of laborers
Pay of mechanics
Pay of sawmill employees
Provisions
Roads and bridges
Transportation, etc., of supplies

7. Petitioner excepts to defendant's disbursements from its funds which bore interest or a higher rate of interest when money was or would have been available from other funds bearing no interest or a lesser rate of interest if defendant had discharged its fiduciary obligations in the light of the foregoing exceptions, and to the failure of defendant to account for the amount of interest lost to petitioners through disbursements from interest-bearing funds when funds bearing no interest or a lesser rate of interest were or should have been available.

Wherefore, petitioner demands that defendant account in those material respects herein set forth and that judgment be had by petitioner for any amounts found to be due and owing to it as a result of defendant's use of its funds.

Respectfully submitted,

JOHN W. CRAGUN
Attorney of Record

WILKINSON, CRAGUN & BARKER
CLARON C. SPENCER
Of Counsel

[Title Omitted in Printing]

* * * *

FIRST AMENDMENT TO PETITIONER'S EXCEPTIONS TO DEFENDANT'S ACCOUNTING

The petitioner's initial exceptions to defendant's accounting filed on June 11, 1963, are hereby amended by adding thereto the following paragraphs:

"8. Petitioner excepts to the failure of defendant to credit interest at the rate of 5% on petitioner's tribal fund: Indian moneys, Proceeds of Labor, Southern Ute Indians, and to the failure to show the amount of interest lost to petitioner through the failure to credit interest as required by law."

"9. Petitioner excepts to the inadequacy of defendant's purported accounting on the further ground that it has not been brought up to date and, therefore, does not reflect what has been done with petitioner's money since 1951 when the initial General Accounting Office report was closed."

Paragraph 6 of the initial exceptions is amended to expand the citation in parentheses to include pages 511 to 519 in the GAO report for the Court of Claims case No. 47567.

The amendment is necessary. After the initial exceptions had been filed and during an investigation into the General Accounting Office records in the pending Court of Claims case *Confederated Bands of Ute Indians* v. *United States*, No. 47567,* counsel discovered the existence of a Southern Ute fund in the Treasury entitled Indian Moneys, Proceeds of Labor, Southern Ute Indians. Certain important information pertaining to this

* No. 47567 in the Court of Claims is a general accounting case for the Confederated Bands of Ute Indians and deals with Confederated Ute funds arising from the former Confederated Ute reservation in Colorado. No. 47567 does not involve funds belonging solely to the Southern Ute tribe. It does not involve any money or funds arising from Southern Ute ownership of the Southern Ute Reservation.

fund had been placed in the GAO report for the Court of Claims case No. 47567 instead of in the GAO report prepared for this case.

By the addition of paragraph 8 and the addition to the initial paragraph 6 in its exceptions, petitioner places in issue the defendant's handling of petitioner's Proceeds of Labor fund on the same grounds applied to the other funds of petitioner named in the initial exceptions.

Paragraph 9 is added to make it clear that petitioner insists upon a full and complete accounting from defendant.

Respectfully submitted,

JOHN W. CRAGUN
JOHN W. CRAGUN
Attorney of Record

WILKINSON, CRAGUN & BARKER
CLARON C. SPENCER
Of Counsel

[Certificate Omitted in Printing]

17 Ind. Cl. Comm. 28

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 328

SOUTHERN UTE TRIBE OR BAND OF INDIANS, PETITIONER

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Decided: May 6, 1966

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. Petitioner, the Southern Ute Tribe of the Southern Ute Reservation, Colorado, organized and incorporated under the Indian Reorganization Act and composed of the allotted Moache and Capote Bands of Ute Indians, seeks to recover (1) just compensation for its lands taken and disposed of by the United States and (2) for the wrongful use by the United States of the proceeds of other lands of petitioner.

2. The lands involved in this proceeding lie within the boundaries of the present day Southern Ute Indian Reservation. The reservation was originally part of a larger reservation in western Colorado to which the Moache and Capote Bands, together with other Ute Indian bands, compositely known as the Confederated Bands of Ute Indians, held recognized title pursuant to a treaty negotiated on March 2, 1868.

3. Historically, the Moache and Capote Bands, together with the Weeminuche Band of Ute Indians, resided on the southern part of the 1868 reservation where a separate agency was established for them on the Rio de los Pinos in accordance with Article IV of the 1868 Treaty. Pursuant to an agreement set forth in the Act of June 15, 1880 (21 Stat. 199), the Confederated Bands of Ute Indians relinquished their Colorado lands in trust to the United States except such lands as were reserved

for the Uncompahgre Utes and for the Moache, Capote and Weeminuche Bands (referred to in the agreement as "Southern Utes"), to reside upon. Thereafter, the Uncompahgre Band and other Ute Indian groups, identified as the White River Band, left Colorado and removed to Utah, while the "Southern Utes" remained in Colorado in the southern part of the 1868 reservation.

4. The Act of July 28, 1882 (22 Stat. 178), provided as follows:

> * * * That all of that portion of the Ute Indian Reservation in the State of Colorado lately occupied by the Uncompahgre and White River Utes be, and the same is hereby, declared to be public land of the United States, and subject to disposal from and after the passage of this act, in accordance with the provisions and under the restrictions and limitations of section three of the Act of Congress approved June fifteenth, eighteen hundred and eighty, chapter two hundred and twenty-three, except as hereinafter provided, under regulations to be prescribed by the Secretary of the Interior in accordance with the provisions of this act.
>
> SEC. 2. That the Secretary of the Interior shall, at the earliest practicable day, ascertain and establish the line between the land mentioned in section one of this act and that now or lately occupied by the Southern Utes in said State; and for that purpose there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of five hundred dollars.
>
> SEC. 3. That all entries, settlements, or locations heretofore made, under any law of the United States, by duly-qualified persons, upon a strip of land extending northerly and southerly, not exceeding ten miles in width, within that part of the Ute Indian Reservation in the State of Colorado lately occupied by the Uncompahgre and White River Ute Indians, and bounded on the east by the one hundred and seventh meridian of longitude west from Greenwich, shall legally date from the time they were respectively made; and the rights of said persons shall be

in all respects the same as if the lands had been legally subject to their claims when the same were initiated: Provided, however, That if homestead entries have been made on said strip, the lands so entered shall be paid for in cash, after proof which would be satisfactory under the pre-emption laws: And provided, further, That none of said lands shall be disposed of for any consideration other than cash, nor for a less price than one dollar and twenty-five cents per acre.

5. Under authority of the Act of June 15, 1880 (21 Stat. 199), and the Act of July 28, 1882 (22 Stat. 178), and within the original reservation established in 1868, a reservation was surveyed for the "Southern Utes", Moache, Capote and Weeminuche Bands approximately 110 miles long, east and west, and 15 miles wide, identified as Royce Area No. 617, Colorado. The Moache and Capote Bands resided in the eastern part and the Weeminuche Band resided in the western part of the newly surveyed reservation.

6. By the Act of May 1, 1888 (25 Stat. 113, § 4), Congress authorized negotiations with the Moache, Capote and Weeminuche Bands as follows:

> The Secretary of the Interior is hereby authorized to appoint a commission, consisting of three persons, with authority to negotiate with the band of Ute Indians of southern Colorado for such modification of their treaty and other rights, and such exchange of their reservation, as may be deemed desirable by said Indians and the Secretary of the Interior; and said commission is also authorized, if the result of such negotiations shall make it necessary, to negotiate with any other tribe of Indians for such portion of their reservation as may be necessary for said band of Ute Indians of southern Colorado if said Indians shall determine to remove from their present location; the report of said commission to be made to and subject to ratification by Congress before taking effect; and for this purpose the sum of then thousand dollars, or so much thereof as may

be necessary, is hereby appropriated, which shall be immediately available.

The Commissioners appointed to negotiate with the Indians were successful in obtaining an agreement whereby the Indians would exchange their reservation in Colorado for a new reservation in the Territory of Utah, but Congress declined to act upon the agreement and, instead, passed the Act of February 20, 1895 (28 Stat. 677), which provides in pertinent part as follows:

> * * * That the agreement made by J. Montgomery Smith, Thomas S. Childs, and R. B. Weaver, commissioners on the part of the United States, with the Southern Ute Indians of Colorado, bearing date November thirteenth, eighteen hundred and eighty-eight, be, and the same is hereby, annulled, and the treaty made with said Indians June fifteenth, eighteen hundred and eighty, be carried out as herein provided, and as further provided by general law for settling Indians in severalty.
>
> SEC. 2. That within six months after the passage of this act the Secretary of the Interior shall cause allotment of land, in severalty, to be made to such of the Southern Ute Indians in Colorado as may elect and be considered by him qualified to take the same out of the agricultural lands embraced in their present reservation in Colorado, such allotments to be made in accordance with the provisions of the Act of Congress approved June fifteenth, eighteen hundred and eighty * * *. And the amendments thereto, as far as applicable hereto, and the treaties heretofore made with said Indians * * *.
>
> SEC. 3. That for the sole and exclusive use and occupancy of such of said Indians as may not elect or be deemed qualified to take allotments of land in severalty, as provided in the proceding section, there shall be, and is hereby, set apart and reserved all that portion of their present reservation lying west of the range line between ranges thirteen and fourteen west of the New Mexico principal meridian, and also all of townships thirty-one and thirty-two

of ranges fourteen, fifteen, and sixteen west of the New Mexico principal meridian and lying in the Territory of New Mexico * * *.

SEC. 4. That at the expiration of six months from the passage of this Act the President of the United States shall issue his proclamation declaring the lands embraced within the present reservation of said Indians except such portions as may have been allotted or reserved under the provisions of the preceding sections of this Act, open to occupancy and settlement, and thereupon said lands shall be and become a part of the public domain of the United States, and shall be subject to entry under the desert, homestead, and town site laws and the laws governing the disposal of coal, mineral, stone, and timber lands; but no homestead settler shall receive a title to any portion of such lands at less than one dollar and twenty-five cents per acre, and shall be required to make a cash payment of fifty cents per acre at the time filing is made upon any of said lands * * *.

SEC. 5. That out of the moneys first realized from the sale of said lands so opened up to public settlement there shall be paid to said Indians the sum of fifty thousand dollars, as follows: Five thousand dollars annually for ten years, and, when paid, the money to be equally divided among all of said Indians per capita, irrespective of age or sex; also the sum of twenty thousand dollars of said proceeds shall be paid to the Secretary of the Interior, who shall invest the same in sheep and divide the said sheep among the said Indians per capita equally, irrespective of age or sex; also to Ignacio, head chief; to Buckskin Charlie, as chief of the Moaches, and Mariano, as chief of the Weeminuches, the sum of five hundred dollars each; also to Tapucke and Tabewatch, as chiefs of the Capotes, the sum of two hundred and fifty dollars each; that the balance of the money realized from the sale of lands, after deducting expenses of sale and survey, shall be held in the Treasury of the United States in trust for the sole use and benefit of said Southern Ute In-

dians. That nothing herein provided shall in any manner be construed to change or interfere with the rights of said Indians under any other existing treaty regarding any annuities or trust funds or the interest thereon.

SEC. 6. That the foregoing provisions of this Act shall take effect only upon the acceptance thereof and consent thereto by a majority of all the male adult Indians now located or residing upon the reservation, which acceptance shall be at once obtained under such regulations as the Secretary of the Interior may prescribe.

7. Following acceptance by the Indians of the provisions of the Act of February 20, 1895, the Moache and Capote Bands, occupying the eastern part of the original reservation, accepted allotments, but the Weeminuche Band declined allotments and remained on the western part of the reservation where a new agency, the Navajo Springs agency, was established for them near Ute Mountain roughly 40 miles southwest of Mancos, Colorado. The lands occupied by the Weeminuche Band were set apart and reserved from entry by Section 3 of the Act of February 20, 1895 (28 Stat. 677). The Weeminuche Band and the lands which they occupied came to be known as the Ute Mountain Tribe and the Ute Mountain Reservation respectively. No lands or proceeds of lands within the Ute Mountain Reservation are claimed by petitioner.

8. The eastern part of the reservation occupied by the Moache and Capote Bands, excepting allotted lands, was opened to entry under the terms of the Act of February 20, 1895, by Presidential proclamation on April 13, 1899 (31 Stat. 1947). Years later, on September 14, 1938, all of the opened lands which had not been disposed of by the United States were restored by order of the Secretary of the Interior, to tribal status as part of the present day Southern Ute Reservation belonging to petitioner.

9. Following the opening of the Moache and Capote lands to entry, Congress passed the Act of May 17, 1900 (31 Stat. 179), entitled "An Act Providing for Free Homesteads in the Public Lands for Actual and Bona

Fide Settlers, and Reserving the Public Lands for that Purpose." That Act provides in pertinent part as follows:

> * * * That all settlers under the homestead laws of the United States upon the agricultural public lands, which have already been opened to settlement, acquired prior to the passage of this Act by treaty or agreement from the various Indian tribes, who have resided or shall hereafter reside upon the tract entered in good faith for the period required by existing law, shall be entitled to a patent for the land so entered upon the payment to the local land officers of the usual and customary fees, and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent for the land covered by his entry; Provided, That the right to commute any such entry and pay for said lands in the option of any such settler and in the time and at the prices now fixed by existing laws shall remain in full force and effect: Provided, however, That all sums of money so released which if not released would belong to any Indian tribe shall be paid to such Indian tribe by the United States. * * * And provided further, That no lands shall be herein included on which the United States Government had made valuable improvements, or lands that have been sold at public auction by said Government.
>
> SEC. 2. That all Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed.

The purpose and effect of the Act of May 17, 1900, was to extend to persons who desired homesteads on opened Indian reservation lands the same opportunity enjoyed by settlers on the public domain, under the (free) homestead law of 1862 (12 Stat. 392), to obtain land without a cash payment.

10. After the Moache and Capote lands were opened to entry in 1899 and before the order of the Secretary of the Interior restoring the opened lands to tribal status in 1938, the defendant took from petitioner and disposed of a large part of petitioner's lands, as follows:

Free homesteads		230,066.93 acres
Soldier's additional homesteads		480.51 acres
	Total	230,547.44 acres

No payment has been made to petitioner for the 230,547.44 acres of land so taken and disposed of.

11. From certain sales of petitioner's lands the defendant collected and deposited in the Treasury of the United States in varying amounts, beginning July 26, 1899, and ending June 30, 1928, the total sum of $215,977.58. The proceeds of petitioner's land sales were recorded on the books of the Treasury to petitioner's credit in a fund entitled "Proceeds of Southern Ute Reservation." The United States thereby became the borrower of petitioner's money and had the use of it under Revised Statutes § 3644 which provides:

> All moneys paid into the Treasury of the United States shall be subject to the draft of the Treasurer. And for the purpose of payments on the public account the Treasurer is authorized to draw upon any of the depositaries, as he may think most conducive to the public interest and to the convenience of the public creditors. Each depositary so drawn upon shall make returns to the Treasury and Post Office Departments of all moneys received and paid by him, at such times and in such forms as shall be directed by the Secretary of the Treasury or the Postmaster General.

12. By the Act of April 1, 1880 (21 Stat. 70), Congress authorized the Secretary of the Interior:

> * * * To deposit, in the Treasury of the United States, any and all sums now held by him, or which may hereafter be received by him, as Secretary of the Interior and trustee of various Indian tribes, on account of the redemption of United States bonds, or other stocks and securities belonging to the Indian trust-fund, and all sums received on account of sales of Indian trust lands, and the sales of stocks lately purchased for temporary investment, whenever he

> is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments; and the United States shall pay interest semi-annually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress.

The rate of interest to be paid on the proceeds of sales of Indian trust lands is 5% as prescribed by Revised Statutes § 3659:

> All funds held in trust by the United States, and the annual interest accuring thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than 5 per centum per annum.

No interest was paid on the proceeds of sales of petitioner's lands until January 31, 1930, when the fund "Proceeds of Southern Ute Reservation" began to be credited with interest at 4% per annum, purportedly under the authority of the Act of February 12, 1929 (45 Stat. 1164), as amended by the Act of June 13, 1930 (46 Stat. 584), which provides as follows:

> That all funds with account balances exceeding $500 held in trust by the United States and carried in principal accounts on the books of the Treasury Department to the credit of Indian tribes, upon which interest is not otherwise authorized by law, shall bear simple interest at the rate of 4 per centum per annum.
>
> SEC. 2. All tribal funds arising under the Act of March 3, 1883 (22 Stat. 590), as amended by the Act of May 17, 1926 (44 Stat. 560), now included in the fund "Indian Money, Proceeds of Labor," shall, on and after July 1, 1930, be carried on the books of the Treasury Department in separate accounts for the respective tribes, and all such funds with account balances exceeding $500 shall bear sim-

ple interest at the rate of 4 per centum per annum from July 1, 1930.

SEC. 3. The amount held in any tribal fund account which, in the judgment of the Secretary of the Interior, is not required for the purpose for which the fund was created, shall be covered into the surplus fund of the Treasury; and so much thereof as is found to be necessary for such purpose may at any time thereafter be restored to the account on books of the Treasury without appropriation by Congress.

SEC. 4. The interest accruing on Indian tribal funds under this Act shall be subject to the same disposition as prescribed by existing law for the respective principal funds.

Interest credited on the fund "Proceeds of Southern Ute Reservation" was reflected in the noninterest-bearing fund "Interest on Proceeds of Southern Ute Reservation."

13. The defendant has paid interest, under the Act of April 1, 1880 (21 Stat. 70), on the money of other Indians deposited in the Treasury after their lands were opened and sold by defendant under statutory terms and conditions substantially the same as those contained in the Act of February 20, 1895 (28 Stat. 677).

14. From time to time, beginning on May 13, 1892, and ending on June 29, 1940, the defendant also received and deposited money belonging to petitioner in the Treasury to petitioner's account in the fund "Indian Moneys, Proceeds of Labor, Southern Ute Indians." The total sum deposited was $19,124.22 derived from the following sources:

Advertising fees	Sale of farm and dairy products
Coal royalties	Sale of iron
Grazing fees	Sale of livestock
Interest on official accounts	
Lease of tribal lands	Sale of rifles, separator, and typewriter

Payment for damages to telephone line	Sale of subsistence
Payments for railroad right of way	Sale of timber
Payment for threshing services	Sale of water
Rental of livestock	Trespass fees
Rental of school building	
Sale of agricultural implements	

No interest was paid on any part of the money deposited in the fund until January 9, 1931, when interest began to be credited at 4% per annum and was recorded in the fund "Interest on Proceeds of Labor, Southern Ute Indians."

16. Petitioner has challenged the defendant's use of petitioner's money for the following purposes, as listed in defendant's accounting:

Agency buildings and repairs	Miscellaneous building material
Agricultural aid	Pay of carpenters
Agricultural implements and equipment	Pay of clerks
Automobiles, vehicles, maintenance and repairs	Pay of farmers
Clothing	Pay of teamsters
Development of Oxford tract	Pay of truck drivers
Fuel, light, water and sewage	Pay of herders and stockmen
Exhibit hall	Pay of interpreters
Hardware, glass, oils and paints	Pay of laborers
Household equipment and supplies	Pay of mechanics
Livestock	Pay of sawmill employees
Maintaining law and order	Provisions
Medical expenses	Roads and bridges
Mills and shops	Transportation, etc., of supplies
Miscellaneous agency expenses	

Inasmuch as the propriety of the above expenditures by defendant remains to be determined, it will be neces-

sary to have further hearings and evidence with regard thereto.

17. When the defendant expended moneys from petitioner's interest-bearing and noninterest-bearing funds, the balances in noninterest-bearing funds were not exhausted before expenditures were made from interest-bearing funds, when both types of funds were equally available for such expenditures.

If defendant had credited petitioner's two interest-bearing funds with interest when the money came into defendant's possession beginning in 1892 and 1900, allowing a reasonable period for delay in deposit, substantial sums of noninterest-bearing funds would have been available to free interest-bearing funds from the charges which defendant made against those funds both before and after interest began to be credited on those funds.

By reason of the expenditure of interest-bearing funds before the expenditure of moneys from the noninterest-bearing funds and by reason of the failure of defendant to credit the interest-bearing funds with interest prior to 1930, the plaintiff has lost interest upon its interest-bearing funds. Since the interest so lost would have been deposited in noninterest-bearing funds it has not been available further to reduce expenditures from the interest-bearing funds.

18. Defendant has acknowledged an erroneous credit of $7.74 to the Confederated Bands of Ute Indians and erroneous transfers of $193.25 from the "Proceeds of Southern Ute Reservation" fund and $800 from the "Interest on Proceeds of Southern Ute Reservation" fund.

19. Petitioner is entitled to recover just compensation for 230,547.44 acres of land taken by defendant and disposed of as free homesteads or soldiers' additional homesteads, based upon the value of such lands as of the date of taking together with interest sufficient to contribute the present full equivalent of that value paid contemporaneously with the taking. The value of the land and the date of taking will be determined at a subsequent proceeding.

20. Petitioner is entitled to recover the total amount by which its funds would have been increased (1) through

the payment of interest at 5% per annum, beginning not later than 30 days after the money came into defendant's possession, on moneys received by defendant from sales of petitioner's lands; (2) through the payment of interest at 4% after July 1, 1930, on any other interest-bearing moneys until actually expended by the defendant for valid purposes; (3) if the erroneous transfers acknowledged by defendant had not been made; and (4) through expenditures from noninterest-bearing moneys before expenditures from moneys which earned or should have earned interest.

ARTHUR V. WATKINS
Chief Commissioner

WM. M. HOLT
Associate Commissioner

T. HAROLD SCOTT
Associate Commissioner

[Title Omitted in Printing]

* * * *

Opinion of the Commission

Scott, Associate Commissioner, rendered the opinion of the Commission.

Petitioner herein, the Southern Ute Tribe, a duly organized tribe of Indians with the right to maintain this action has, by petition duly filed, prayed the Commission for judgment against defendant under Clauses 1, 3 and 5 of Section 2 of the Indian Claims Commission Act (60 Stat. 1049) "* * * for an amount which will provide fair and just compensation for the approximately 220,495.17 acres of land unlawfully disposed of by defendant, and that defendant be required to render a true, complete and proper accounting for the proceeds received by it from the disposal of the approximately 81,953.18 acres of land, less any proper credits or set-offs, * * *".

The specific allegations of the petition upon which petitioner relies as a basis for the above prayer are 8e and 8f and the corresponding allegations of damages found in 9a through 9d.

Paragraphs 8e and 9a and 9b concern themselves with the disposal of Free Homesteads, Soldiers' Additional Homesteads, Other Reservations of Land, and Homestead Applications. After a search of the records of the Bureau of Land Management petitioner has increased the acreage alleged to 230,547.44 acres and has dropped the Homestead Application class and the Other Reservations of Land class.

Paragraphs 8f and 9c and 9d concern themselves with certain other types of land disposals and request an accounting for the proceeds therefrom alleged to have been received by defendant.

Defendant relies upon the defenses of *res judicata*, defect of parties, and lack of jurisdiction by the Commission based upon the alleged failure of petitioner to state a cause of action for an accounting for certain funds prior to the expiration of the date for filing claims before this Commission, i.e., August 13, 1951.

Underlying the defense of *res judicata* is the contention of defendant that all of the Colorado Reservation belonging to the Confederated Bands of the Ute Indians was ceded under the Treaty of June 15, 1880. This defense is directed to the proposition of whether or not defendant is liable to petitioner for the disposal of land under the Free Homestead Law instead of by sale to settlers. In order to properly assess this question it is necessary to go into the background of the relationship between the Ute Indians and defendant.

Under the Treaty of March 2, 1868 (15 Stat. 619) the defendant granted a reservation in Colorado to the Tabequache, Moache, Capote, Weeminuche, Yampa, Grand River and Uintah Bands of Ute Indians.

These bands subsequently became known as the Uncompahgre Utes (Tabequache), the Southern Utes (Moache, Capote, and Weeminuche), the White River Utes (Yampa, Grand River, and Uintah) and the three groups were known as the Confederated Bands of Utes, although there was no formal confederation.

The part of this reservation occupied by the Southern Utes lay along the southern border of the 1868 reservation and is today still designated as the Southern Ute Reservation.

Under the Act of June 15, 1880 (21 Stat. 199) the Confederated Bands of Utes relinquished their lands in trust to the defendant except for certain lands reserved for the Uncompahgre Utes and for the Moache, Capote and Weeminuche Bands, referred to in said Act as the Southern Utes.

The Act of July 28, 1882 (22 Stat. 178) provided for the opening of the lands lately occupied by the Uncompahgre and White River Utes and for the surveying of the line between the land so opened and that occupied by the Southern Utes.

This line established a boundary between the Southern Utes and the lands opened for sale. This created a strip of territory 110 miles long by 15 miles wide. The strip had already been created in fact as a result of the Brunot Cession of 1874 which took a portion of the Ute reservation prior to the Cession of June 15, 1880 (21 Stat. 199).

(See Docket No. 327, 11 Ind. Cl. Comm. 180) This 110 mile long area is referred to as Royce Area 617, Colorado. The Moache and Capote Bands resided in the eastern part and the Weeminuche Band resided in the western part of the area.

By the Act of May 1, 1888, Congress authorized the Secretary of the Interior to appoint a Commission, "* * * with authority to negotiate with the band of Ute Indians of southern Colorado for such modification of their treaty and other rights, and such exchange of their reservation, as may be deemed desirable by said Indians * * *".

Although agreement was reached between the Commission and the Southern Utes, Congress declined to ratify it and, instead, passed the Act of February 20, 1895 (28 Stat. 677) which provided that the Treaty of June 15, 1880 be carried out. Section 2 of the Act of 1895 stated that allotments would be made to the Southern Utes "* * * out of the agricultural lands embraced in their present reservation in Colorado * * *", as provided in the Act of June 15, 1880.

Section 3 of the 1895 Act made provision for those Southern Utes who did not take allotments to occupy that part of "* * * their present reservation * * *" which lay west of the range line between ranges thirteen and fourteen west of the New Mexico principal meridian and added all of Townships 31 and 32 of Ranges 14, 15 and 16 west of the New Mexico principal meridian and lying in the Territory of New Mexico.

Section 4 provided for the opening of the remainder of the lands by Presidential Proclamation after six months from the passage of the Act, said lands to become thereafter a part of the public domain "* * * and shall be subject to entry under the desert, homestead, and town site laws and the laws governing the disposal of coal, mineral, stone, and timber lands; but no homestead settler shall receive a title to any portion of such lands at less than one dollar and twenty-five cents per acre, and shall be required to make a cash payment of fifty cents per acre at the time filing is made upon any of said lands * * *".

Section 5 provided for compensation to the Southern Utes and "* * * that the balance of the money realized from the sale of lands, after deducting expenses of sale and survey, shall be held in the Treasury of the United States in trust for the sole use and benefit of said Southern Ute Indians. * * *".

Section 6 stated that the provisions of the Act should take effect only upon the acceptance thereof and consent thereto by a majority of all the male adult Indians then located or residing upon the reservation.

The consent of the Southern Utes was duly obtained and the Moache and Capote Bands accepted allotments in the eastern part of the area and the Weeminuche, declining allotments, remained on the western part, including the area of New Mexico which was added by the 1895 Act. This group is now known as the Ute Mountain Tribe of the Ute Mountains Reservation.

On April 13, 1899 (31 Stat. 1947) the remaining unallotted lands in the eastern part of the area were opened to public entry. That portion of these lands which had not been disposed of was returned to tribal ownership on September 14, 1938.

From the above summary of the background of the relations between petitioner and defendant since the 1880 Agreement, it seems apparent that defendant has by its actions acknowledged the contention of petitioner that the area known as the Southern Ute Reservation was not ceded by the 1880 Agreement. Defendant's contention that the language of the 1880 Agreement is plain and that it ceded all of the Colorado land belonging to the entire Ute Indian group, except that to be allotted, cannot stand in the face of the treatment by defendant of that portion of the lands occupied by the Southern Utes. Every action by defendant concerning the Southern Ute Reservation has been based upon the proposition that the Southern Utes were still the rightful owners of the area. The two ultimate acts along that line were the 1895 Act which placed the proceeds of actual sales in a Southern Ute trust fund and the restoration of the undisposed of lands to Southern Ute tribal ownership in 1938.

The further argument is made that the Act of July 28, 1882 (22 Stat. 178) and the Act of February 20, 1895 (28 Stat. 677) were supplementary to the 1880 Agreement (21 Stat. 199) and were merely an attempt to force compliance by the Southern Ute with the terms of the 1880 Agreement wherein they had agreed to accept allotments.

This argument would be more persuasive were it not for defendant's subsequent action. Defendant has not followed a course of conduct with regard to the Southern Ute Reservation which tends to verify such a construction. On the contrary, as briefly outlined above, the actions of defendant have been overwhelmingly opposed to its present position.

The most telling argument against defendant's position in this regard is the treatment accorded the same argument when it was used by defendant in the case of *Confederated Bands of Ute Indians* v. *The United States*, 100 C. Cls. 413, 429-433. There the Court held that defendant acquired under the Agreement of 1880 only the right to sell the lands for the Utes and not the lands themselves. Consequently it was held that the taking in that instance occurred under the Adams amendment in 1938 unless the land had been disposed of earlier to individuals. This same argument, it seems to the Commission, would apply with equal validity to the Southern Utes.

For the foregoing reasons the Commission concludes that the Southern Utes retained the same interest in their lands and that the lands encompassed within the boundaries of the 110 mile long by 15 mile wide area were acknowledged by defendant as never having been disposed of by the Southern Utes under the 1880 Agreement. In this instance the term Southern Utes is used to include all three bands because up until the separation of the Weeminuche Band under the Act of February 20, 1895 (28 Stat. 677) they too had an interest in the whole. There is, however, no claim made herein by the present-day Southern Utes for any of the reservation set apart for the present-day Ute Mountain Utes under the 1895 Act.

Defendant's reliance upon Court of Claims case No. 30360, *The Ute Indians* v. *The United States*, 45 C. Cls. 440, is misplaced in view of the Commission's decision that the June 15, 1880 Agreement (21 Stat. 199) did not effect the disposition of the Southern Ute Reservation. The accounting had in that case which included any of the Southern Ute lands disposed of under the February 20, 1895 Act (28 Stat. 677) was clearly beyond the jurisdiction of the Court of Claims under the terms of the Jurisdictional Act of March 3, 1909 (35 Stat. 788-789) which conferred jurisdiction upon the Court to carry out the terms of the June 15, 1880 Agreement.

The error which caused the proceeds already placed to the credit of the Southern Ute Tribe to be included in that judgment was just that, an error on the part of all concerned. Under the terms of the 1895 Act those funds had been handled separately from the funds of the other Ute tribes. The lands had been opened at different times by different acts from those involving the Confederated Ute lands and the money had been placed in a trust fund to the credit of the Southern Utes, whereas the money received from land sales under the 1880 Agreement was placed to the public treasury instead of to the credit of the Confederated Utes.

Defendant also relies upon other litigation between the Confederated Ute Bands and itself. Specifically, defendant pleads the cases found in 100 C. Cls. 413, 112 C. Cls. 123, and 117 C. Cls. 443, being the series of cases between the Confederated Bands of Ute Indians and defendant which arose under the Jurisdictional Act of June 28, 1938 (52 Stat. 1209) as amended. This litigation did not include any of the lands of the Southern Ute Tribe which are in controversy in this case.

The stipulation entered into between the Confederated Utes and defendant as a part of the judgment in those cases was limited to lands ceded under the Act of June 15, 1880 (21 Stat. 199) and under the Jurisdictional Act, as amended, of June 28, 1938.

While petitioner herein, the Southern Utes, was a constituent part of the petitioner therein, Confederated Utes,

it is not precluded from bringing this different cause of action under its own name and in its own right. By the same terms, any language in the stipulation settling the cases under the 1938 Jurisdictional Act will not bar defendant from asserting offsets, if any, which it may have against the petitioner herein. This is a separate and distinct cause of action from any of those asserted in the prior cases and neither petitioner nor defendant is bound by the proceedings therein with regard to the matters being litigated in this case.

As stated in *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620, 623 (1933):

* * * *

> The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. *Cromwell* v. *Sac County*, 94 U.S. 351, 352, 353; *Southern Pacific R. Co.*, v. *United States*, 168 U.S. 1, 48; *United States* v. *Moser*, 266 U.S. 236, 241.

* * * *

As we have stated above, this is a separate and distinct cause of action by a different petitioner for lands disposed of pursuant to the Act of February 20, 1895 (28 Stat. 677) as free homesteads. This, of course, places the present case squarely within the law as set forth above in the *Tait* case in that, even assuming the parties were the same, the claim herein is upon a different claim or demand.

For the above reasons we are of the opinin that petitioner, the Southern Ute Tribe as it presently exists, is entitled to recover of defendant upon its claim for the value of 230,547.44 acres of land disposed of by defendant from their reservation without compensation therefor as called for by the Act of February 20, 1895 (28 Stat. 677).

The question as to whether the taking was one under the Fifth Amendment to the Constitution seems to be well settled under several decisions of the Supreme Court and the Court of Claims, which decisions have been followed by this Commission.

The title under which the Southern Utes held their reservation was recognized by the Treaty of March 2, 1868 as being in the Confederated Utes of which they were then a part. Thereafter defendant by several different actions mentioned earlier in this opinion reaffirmed the title of the Southern Utes to their reservation after the Act of June 15, 1880 separated them by placing the remainder of the original reservation under the control of defendant.

The taking of petitioner's recognized title by defendant constituted a taking under the Fifth Amendment to the Constitution for which petitioner is entitled to recover just compensation based upon the value of the lands as of the date or dates of taking, together with interest thereon sufficient to produce the present full equivalent of the value of those lands as of the date or dates of taking. *Creek Nation* v. *United States*, 295 U.S. 103 (1935).

The taking of these lands by defendant covered a period of many years because they were disposed of as free homesteads and soldiers' additional homesteads, so each taking occurred when the ownership of each individual became final. *Creek Nation* v. *United States*, 302 U.S. 620, 622 (1938).

As suggested in the *Creek* case cited above, the dates would normally be the date of the patent to the individuals. Since this would be a burdensome job it is suggested that an average date or dates be worked out by the parties subject to the approval of the Commission.

It would appear that defendant's asserted defense of lack of necessary parties is a constituent part of its claim that the entire Colorado Reservation of the Confederated Utes was ceded in 1880. Had that been the case then the present-day Ute Mountain Utes as well as the remainder of the Confederated Utes would have been necessary parties. Since it has been determined that peti-

tioner's lands were not ceded by the 1880 Agreement this defense is of no validity.

Also, any claim which the Ute Mountain Utes might have, if any, would be separate from the claim of petitioner. Petitioner herein claims no land in the present-day Ute Mountain Reservation.

The next phase of petitioner's case concerns the handling by defendant of its trust fund moneys arising from the sale of the Southern Ute Reservation lands under the terms of the Act of February 20, 1895.

Defendant contends that this accounting claim is not within the jurisdiction of this Commission because of the failure of petitioner to allege such a cause of acton prior to the expiration of the five year period of limitations provided by Section 12 of the Indian Claims Commission Act, 25 U.S.C., Sec. 70k. This period expired on August 13, 1951 and defendant contends that this accounting claim was first alleged in 1963 by means of exceptions by petitioner to defendant's accounting report filed in response to the petition.

Petitioner included among its allegations contained in the petition filed on August 10, 1951, a claim for an accounting for moneys received by defendant for some 81,-953.18 acres of land disposed of in various ways other than as free homesteads or soldiers' additional homesteads. As stated previously this allegation is found in paragraph 8f and the allegations of damages are found in paragraphs 9c and 9d of the petition.

Defendant presented to petitioner an accounting report by the General Accounting Office in reply to the allegation contained in the petition. This report set forth, among other things, an accounting of the proceeds derived from the sale of certain lands pursuant to the Act of February 20, 1895, together with an accounting of the interest on said proceeds during the period from February 12, 1929 to June 30, 1951.

Petitioner, after receiving this report, proceeded to file exceptions to certain matters contained therein. These exceptions were filed June 12, 1963.

On September 30, 1963 petitioner filed an amendment to its exceptions, adding thereby two more exceptions, the

last of which calls for an extension of the accounting by defendant "up to date".

Defendant's objection goes specifically to the fact that petitioner has requested an accounting in its petition for certain specific items and has now raised by means of the exceptions mentioned above, and after the receipt of defendant's General Accounting Office Report, certain general accounting claims not referred to in its petition.

Defendant's contention, carried to its ultimate conclusion, would seem to place upon petitioner the burden of knowing what defendant had done with its money before filing its petition. This would be unreasonable on its face. Petitioner cannot be expected to know what its trustee has done with money under its control until such time as petitioner is presented with the figures.

The essential question is whether petitioner is to be penalized for not calling for a general accounting instead of an accounting for specific items which it had reason, based upon the terms of the Act of February 20, 1895, to suspect might have been mishandled by defendant.

This is a matter peculiar to our organic act with its definite period of limitations. It is not readily apparent how a similar question could arise under general law since limitations would not, as a normal rule, begin to run until the aggrieved party knew, or should have known, that his trustee had created a cause of action through the handling of the trust moneys.

We think that much the same principle should apply to a similar situation under our enabling legislation and that the issues raised by petitioner as a result of defendant's accounting are reasonable in that petitioner was not in a position to know whether defendant was properly executing its duties as trustee. Defendant, being in the unique position of not having to file periodic accountings to its Indian wards, should not be allowed to take advantage of that fact for its own protection.

We are of the opinion that the allegation for a specific accounting which brought forth the accounting report and thereby revealed other and further apparent misuse of petitioner's funds, is a sufficient basis for requiring a further and complete accounting from defendant with

regard to those items questioned by petitioner in its exceptions.

The Commission is aware that defendant restricted the introduction of the General Accounting Office Report to the issue of liability for the land allegedly disposed of free and the specific accounting for lands as stated in the petition. However, defendant cannot restrict the purposes for which its evidence is introduced and thereby deny petitioner the right to an accounting for which a basis has been established in the petition.

The exceptions to defendant's accounting filed by petitioner are a part of the pleadings in the case and will not be set forth in the findings or opinion. However, it is necessary to discuss them for the purpose of clarity and understanding of the Commission's ruling with regard to each of them. They will be referred to by number as they appear in the pleadings.

It should be noted at this point that defendant rested its defense entirely upon other grounds and has not yet answered or contested these exceptions.

This places the Commission in the position of ruling upon matters contained in the exceptions without benefit of a defense thereto. However, under the decision of the Commission defendant is called upon to file a further accounting and is entitled to know as nearly as possible the extent to which it will be required to expend the present accounting report. The Commission will entertain such further proceedings as may in its opinion be necessary to insure a complete record in this matter.

It should be pointed out at this juncture that the Commission in this opinion is restricting its rulings to the questions arising under existing agreements between petitioner and defendant, i.e., the Act of February 20, 1895 (28 Stat. 677), wherein by Section 5 it was agreed that certain moneys of the Southern Ute Tribe would be held in trust and to such Acts, i.e., Act of April 1, 1880 (21 Stat. 70), providing for interest on sums received from the sale of Indian trust lands; Section 3659 of the Revised Statutes (31 U.S.C. § 547a) which establishes the rate of interest on such sums at not less than 5% per annum; and Act of February 12, 1929 (45 Stat. 1164)

as amended by Act of June 13, 1930 (46 Stat. 584), providing that funds in excess of $500 held in trust by defendant in principal accounts upon which interest was not otherwise payable, should bear simple interest at the rate of 4% per annum.

The Commission does not intend to express any opinion concerning the duties or obligations of the Congress under its plenary power over Indian affairs.

Exception No. 1 concerns petitioner's right to have its moneys covered into the Treasury of the United States without undue delay. The Court of Claims in the case of *The Menominee Tribe of Indians* v. *United States*, 107 C. Cls. 23, 32-33 (1946) stated that 30 days was a reasonable time in which to deposit moneys belonging to the Menominee Tribe. The ruling thereon was based upon an implied agreement by defendant under the Acts involved to make a prompt deposit of the money. The Commission is of the opinion that the duty owed by defendant in its fiduciary capacity (See *Seminole Nation* v. *United States*, 314 U.S. 286 (1942) and *Menominee Tribe of Indians* v. *United States*, 101 C. Cls. 10, 19) is sufficient cause to insure that administrative delays shall not deprive an Indian tribe of interest upon those funds on which it may be entitled to draw interest. Defendant shall supply the pertinent information insofar as the records will permit.

Exception No. 2 questions the practice of defendant with regard to the advancement of tribal trust funds to disbursing agents. Petitioner alleges on information and belief that there exists in many cases an inordinate delay between the time money is credited to the account of the disbursing agent, thereby stopping the payment of interest, and the time of its actual disbursement. During this period of time defendant has the use of this money without the payment of interest, petitioner alleges. This information is not reflected in the General Accounting Office Report and so it is impossible to tell whether the allegation is correct. Petitioner, as *cestui que trust* "* * * is entitled to demand of the trustee all information about the trust for which he has any reasonable use". (Bogert, Trusts & Trustees, § 961). Defendant, as trustee, is un-

der a duty to furnish such information, insofar as possible.

Exception No. 3 deals with defendant's alleged failure to credit interest at the rate of 5% on petitioner's tribal fund "Proceeds of Southern Ute Reservation" and the failure of defendant to show in its accounting the loss occasioned thereby.

Since the statutes appear to be quite clear with regard to the duty of defendant to deposit such funds (21 Stat. 70) and make them productive (31 U.S.C. § 547a) in its capacity as trustee, then it is bound to credit such interest and to show its calculations in doing so in order that petitioner may check the results of such calculations. See *Sioux Tribe of Indians* v. *United States*, 105 C. Cls. 725, 801-802 (1946); *Wootton Land & Fuel Co.*, v. *Ownbey*, 265 Fed. 91, 99-100 (C.C.A. 8, 1920).

Exception No. 4 concerns the erroneous transfer of $193.25 from petitioner's fund "Proceeds of Southern Ute Reservation" to the "Confederated Bands of Utes 4% Fund" and the interest lost by such transfer.

This exception seems clear on its face and defendant must account for the transfer and the interest lost thereby. The money involved belonged to the Southern Utes and not to the Confederated Bands.

Exception No. 5 deals with a similar erroneous transfer of $800 from petitioner's fund "Interest on Proceeds of Southern Ute Reservation" to the fund "Interest on Ute 5% Fund, Southern Ute."

Page 17 of the G.A.O. Report shows this to have been an erroneous transfer and petitioner is entitled to an accounting and correction.

Although not mentioned in the exceptions there is shown on Page 7 of the G.A.O. Report an erroneous credit of $7.74 to the Confederated Bands. This would seem *de minimus* but petitioner is, nevertheless, entitled to an accounting and correction.

Exception No. 6 deals with a variety of expenditures from petitioner's funds which petitioner alleges are improper as being obligations of defendant. Petitioner then specifically excepts to the failure of defendant to disclose (a) the amount of petitioner's tribal funds expended for

obligations of the defendant, and (b) the amount of interest lost to petitioner as a result of this alleged improper use of petitioner's funds by defendant.

This appears to be a situation wherein petitioner would deprive defendant of its right to defend its actions as trustee whether right or wrong. To force defendant to judge its actions and convict itself is improper. The G.A.O. Report sets forth the various expenditures and it then becomes a question of their legality under the agreements and statutes which may be applicable. Their legality is a question which ultimately must be determined by the Commission. Until that determination is made there can be no calculation of damages, if any, through loss of interest.

This is the same type of problem which this Commission had in mind when it stated in its opinion in *Sioux Tribe, et al* v. *United States*, 12 Ind. Cl. Comm. 541, 549, that it would not force defendant to point out its own wrongs under the guise of having to carry the burden of proof. The filing of an exception to the G.A.O. Report whereby the same procedure is attempted will not be permitted.

Since the specific expenditures set forth within Exception No. 6 carry with them in the G.A.O. Report the amount expended through June 30, 1951, the Commission presumes that the broad language of Subsection 6(a) of Exception No. 6 must be intended to refer to other as yet undisclosed expenditures and in that light is of the opinion set forth immediately above.

As to those specific items mentioned in Exception No. 6, it shall be incumbent upon defendant to satisfy this Commission as to their legality. (*The Sioux Tribe of Indians* v. *United States*, 105 C. Cls. 725, 801-802) Until that decision is reached there can be no accounting by defendant with regard to these specific items insofar as loss of interest, if any, is concerned.

Exception No. 7 goes into the broad problem of defendant's expenditures from various funds belonging to petitioner. It is petitioner's contention that defendant's fiduciary obligation required it to expend petitioner's money in a manner so as to conserve it to the best advantage

of petitioner. Specifically petitioner contends that wherever defendant chose to disburse money from a fund or funds bearing a higher interest rate than another fund or funds which were or should have been equally available and which carried no interest or a lower rate of interest, it was guilty of enriching itself at the expense of its *cestui que trust.*

On the evidence before us it appears that the situation with regard to the expenditures from various funds does not differ in this case from that of the *Menominee Tribe* v. *United States*, 101 C. Cls. 10, 21 (1944), wherein the Court stated:

* * * *

> We conclude, therefore, that to whatever extent the Secretary of the Interior could have, in the course of prudent management of the affairs of the Indians, and without impairing funds which he reasonably thought it was necessary to keep supplied for the purpose of meeting authorized expenditures, used the non-interest-bearing funds or those bearing the lower rate of interest, and instead used funds bearing interest, or a higher rate of interest, the Government is under a duty to pay to the plaintiffs the interest thereby lost by them.

* * * *

Defendant will furnish the appropriate information in its supplemental accounting.

Exception No. 8, filed by way of amendment after discovery by petitioner of the information contained in the G.A.O. Report for Case No. 47567 before the Court of Claims, consists of an objection to the failure of defendant to credit interest at the rate of 5% on its fund "Indian Moneys, Proceeds of Labor, Southern Ute Indians" and to the failure of the G.A.O. Report to show the amount of interest lost thereby.

Petitioner ends this exception with the statement "* * * as required by law". There is in evidence no statute or statutes requiring the payment of interest at 5% on miscellaneous funds. The only statute to which our attention has been called is that of February 12, 1929 (45 Stat.

1164), as amended by the Act of June 13, 1930 (46 Stat. 584) which requires that tribal funds included in the fund "Indian Money, Proceeds of Labor" should bear simple interest after July 1, 1930 at the rate of 4%.

Insofar as the accounting shown in Petitioner's Exhibit No. 25 (accounting in Case No. 47567) is deficient under those statutes, defendant shall prepare a proper accounting.

It is the opinion of the Commission that on the record before us petitioner is entitled to 4% interest from the date of the applicable statute of June 13, 1930 (46 Stat. 584) and not to the 5% claimed. It is also entitled to have the accounting brought up to date, including the interest due, if any.

Petitioner contends that the moneys received by defendant from sales of timber, water and iron, from grazing fees and from land leases, are proceeds of the land and constitute an element of value in those lands and so should have interest credited at 5% the same as the land proceeds. Petitioner cites *United States* v. *Klamath Indians*, 304 U.S. 119, 122 (1938) as support for this contention.

We do not agree that this case is in point. In that case the Indians would have been denied the value of the timber had it not been included in the value of the land. This is not the case here. The value of these elements has been received by petitioner and we are now talking of the amount of interest to be paid by defendant under the appropriate statutes on those funds after they come under defendant's control as trustee.

It is our opinion that once those elements were converted to money in the Treasury they assumed the character of general funds and as such fell under the statute calling for 4% interest rather than the statute requiring 5% interest on moneys from trust lands.

Petitioner also amends Exception No. 6 to include the specific expenditures listed in the portion of the G.A.O. Report in Case No. 47567 known as Petitioner's Exhibit No. 25 in this case. The same ruling applied in Exception No. 6 would apply to these expenditures. Defendant, as trustee, must satisfy this Commission as to their

legality under the *Sioux* case cited in Exception No. 6, and no further accounting can be had until this is done.

Exception No. 9 raises the question as to the adequacy of defendant's G.A.O. Report since it does not account beyond June 30, 1951.

This is a question of first impression with this Commission. The closest analogy to this situation within the Commission's decisions is the matter of offsets. In the case of *The Kiowa, Comanche and Apache Tribes* v. *United States*, 5 Ind. Cl. Comm. 72, 109-111, the right of defendant to present claims for gratuitous offsets beyond the cutoff date for filing cases before the Commission was upheld.

This ruling was made on the authority of the Court of Claims decision in the *Sioux Tribe of Indians* v. *United States*, 105 C. Cls. 725, 811-812, wherein the Court did allow offsets by defendant after the closing date of the jurisdictional act permitting the suit.

The *Sioux* case was an accounting case just as this part of the present case is. The Court stated as follows:

* * * *

> Plaintiff does not ask that final judgments be now entered for the amounts of the balances shown, but contends that since it was the duty of defendant under the allegations of the original petition to make a complete accounting with reference to these and other trust funds, and such accounting has not been rendered subsequent to June 30, 1925, judgments should be entered that plaintiff is entitled to recover with respect to the balances and that further proceedings should be had under Rule 39(a) to determine, on further accounting, the exact amounts, if any, for which final judgments should be entered. In other words plaintiff says that after we have decided the issues presented we should order a further accounting as to the balances and allow plaintiff another opportunity to raise further issues if it should so desire.
>
> There must be an end to the cases. We cannot keep them open indefinitely for plaintiff's convenience in order that it may have several trials and decisions

> in each case as to its legal right to recover on the issues presented and which may be later presented before closing the cases on final accounting as to the offsets, if any, against such amounts as may be due under the decision on the issues presented when the cases were prepared, argued and submitted. Rule 39(a) was not intended to authorize or provide for several trials on questions as to legal rights of an Indian Tribe to recover, or to permit piecemeal trials in chief. Plaintiff knew when it received the accounting report on April 19, 1932, that the accounting ended on June 30, 1925, and no mention was made of the matter until the briefs in the seven cases were filed. The cases were argued and submitted on the specific issues decided herein, and if plaintiff believes that it has other or further claims it must petition Congress for relief or for further permission to sue thereon. Plaintiff has had its day in court as to the right of recovery on all issues which it saw fit to raise, prepare and submit for decision. The time has passed for asking for a remand for a further or supplemental accounting on matters concerning questions required to be tried and submitted in the first trial under Rule 39(a). Cf. *Cherokee Nation* v. *United States*, 102 C. Cls. 720, 760.
>
> * * * *

It will be noted from the above quoted language that the basis for the Court's refusal to permit a further accounting from defendant was based upon the failure of petitioner to raise the question in a timely manner. The case had been completed upon the issues presented after petitioner had the G.A.O. Report and knew its closing date. It is obvious that the Court could foresee an endless round of trials with defendant updating offsets and petitioner updating accounting claims. Primarily, however, the Court appeared to feel that petitioner had failed to take advantage of its opportunity to raise the matter before the deadline for filing under the jurisdictional act.

We have held herein that petitioner is not barred from raising the accounting issues under Section 12 of our organic act and so any claim for an up-to-date accounting is still a "live" claim as well.

We too accept the necessity for an end to those cases and under the same circumstances as in the *Sioux* case would feel bound to follow the decision of the Court of Claims therein.

Since this is a matter wherein defendant will be under the necessity of accounting further for its handling of petitioner's money and the issues are not yet closed by decision of the Commission it is our opinion that defendant should bring its accounting up to the date of the judgment herein. This would be equivalent to the right of defendant to assert offsets to the same date. Since our act is silent as to both questions it appears equitable that both parties be treated the same with respect to the offsets of defendant and the accounting due petitioner.

This matter will now proceed to a determination of the date or dates of taking of the 230,547.44 acres of petitioner's lands by defendant and the value of said lands on such date or dates.

Since no consideration was paid for these lands, that phase of the litigation is not involved and defendant may proceed to amend its answer and set forth its offsets, if any, in conformity with the rules of the Commission.

The accounting phase of this case may not proceed until a decision is reached with regard to the specific expenditures alleged by petitioner to have been improperly made by defendant. The parties shall proceed immediately to present to this Commission their evidence and arguments concerning the expenditures listed in Finding of Fact No. 16 and those set forth in Court of Claims Case No. 47567 and which are listed in Petitioner's Exhibit No. 25 in this case wherein they properly belong.

Upon the decision as to these expenditures defendant will be required to file its supplemental accounting.

An order to the above effect will be entered.

T. HAROLD SCOTT
Associate Commissioner

We concur:

ARTHUR V. WATKINS
Chief Commissioner

WM. M. HOLT
Associate Commissioner

[Title Omitted in Printing]

* * * *

FIRST INTERLOCUTORY ORDER

UPON the findings of fact this day entered in this cause and which are made a part of this order, the Commission concludes as a matter of law that petitioner is entitled to just compensation for 230,547.44 acres of petitioner's land disposed of by defendant without payment to said petitioner, and it is

FURTHER CONCLUDED as a matter of law that petitioner is entitled to a supplemental accounting from defendant with regard to the matters set forth in the findings of fact and in accordance with the opinion of the Commission this day filed, and it is therefore

ORDERED that this cause shall proceed to a determination of the date or dates of taking of petitioner's lands and the value of said lands upon such date or dates, and

THAT the parties herein shall forthwith present to this Commission their contentions with regard to the specific items of expenditure by defendant from petitioner's fund or funds which have been challenged by petitioner as being improper, including those items set forth in Finding of Fact No. 16 and those items in Petitioner's Exhibit No. 25, which were challenged by way of exception.

Dated at Washington, D. C., this 6th day of May, 1966.

ARTHUR V. WATKINS
Chief Commissioner

WM. M. HOLT
Associate Commissioner

T. HAROLD SCOTT
Associate Commissioner

IN THE UNITED STATES COURT OF CLAIMS

App. 7-66

THE UNITED STATES, APPELLANT

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS, APPELLEE

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELETON and NICHOLS, Judges

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ORDER

This case comes before the court on the appeal by the United States from the interlocutory order of the Indian Claims Commission entered May 6, 1966, in its Docket No. 328. Upon consideration thereof, together with the opposition of the appellee, the court is of the opinion that, in the light of the appellee's acknowledgment at the oral argument that the lands involved in this case were ceded to the United States by the Act of June 15, 1880, but were in effect re-ceded to the appellees by the Act of February 20, 1895, the case should be remanded to the Commission for the hearing of additional evidence and the making of findings of fact with respect to the intention of the parties to the stipulation upon which a final judgment was entered in Court of Claims Case No. 46640 (117 Ct. Cl. 436) on July 13, 1950.

NOW, THEREFORE, IT IS ORDERED that this case be and is hereby remanded to the Indian Claims Commission with instructions to hear additional evidence, including but not limited to testimony of the signatories to the stipulation mentioned above, and to make and report to this court findings of fact on the question as to whether by said stipulation, it was the intention of the parties thereto that the final judgment entered in Court

of Claims Case No. 46640 would be *res judicata* as to the land involved in this case. *Cf. Standing Rock Sioux Tribe of North Dakota and South Dakota* v. *United States*, No. 259-63, order of November 14, 1966.

BY THE COURT

WILSON COWEN
Chief Judge

May 15, 1967

COURT OF CLAIMS

IN THE UNITED STATES COURT OF CLAIMS

App. 7-66

THE UNITED STATES, APPELLANT

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS, APPELLEE

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELETON and NICHOLS, Judges

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ORDER

This case comes before the court on appellant's motion for rehearing and appellee's motion to vacate order of remand. Upon consideration thereof, together with the response thereto and without oral argument,

IT IS ORDERED that the said motions be and the same are denied.

IT IS FURTHER ORDERED that the following words and punctuation, appearing in the first paragraph, starting at line 6 thereof, of the order entered herein on May 15, 1967, be and the same are deleted and vacated: ", in the light of the appellee's acknowledgment at the oral argument that the lands involved in this case were ceded to the United States by the Act of June 15, 1880, but were in effect re-ceded to the appellees by the Act of February 20, 1895,".

BY THE COURT

WILSON COWEN
Chief Judge

Filed Oct. 9, 1967
Court of Claims

21 Ind. Cl. Comm. 268

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 328

SOUTHERN UTE TRIBE OR BAND OF INDIANS, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Decided: June 27, 1969

ADDITIONAL FINDINGS OF FACT

Statement

Plaintiff filed a petition with the Commission on August 10, 1951, praying among other things for fair and just compensation for approximately 220,495.17 acres of land unlawfully disposed of by defendant. On May 6, 1966, the Commission in the case of *Southern Ute or Band of Indians* v. *United States*, 17 Ind. Cl. Comm. 28, entered findings of fact and issued an interlocutory order concluding as a matter of law that plaintiff was entitled to just compensation for 230,547.44 acres of plaintiff's land disposed of by the defendant without payment to plaintiff. The defendant appealed from said order contending, among other things, that all claims concerning the 230,547.44 acres of land had been fully settled, paid, extinguished and adjudicated in a previous case before the Court of Claims (Case No. 46640, *Confederated Bands of Ute Indians* v. *United States*, 117 Ct. Cl. 433, 436 (1950)).

On May 15, 1967, the Court of Claims issued an order of remand with instructions to the Commission to hear additional evidence, including but not limited to testmony of the signatories to the stipulation in the *Confederated Ute* case, *supra*, and to make and report to that Court findings of fact on the question as to whether by said stipulation it was the intention of the parties thereto that

the final judgment in Case No. 46640 would be *res judicata* as to lands involved in this case.

Pursuant to that remand the Commission held two hearings. The first hearing was on plaintiff's motion for the production of documents. The second hearing involved the taking of evidence as to the intention of the parties at the time of the signing of the stipulation in Court of Claims Case No. 46640.

At both hearings the defendant took the position that the stipulation spoke for itself and that the intentions of the parties would have to be determined within the four corners of the stipulation. At the hearing on plaintiff's motion for production of documents the defendant contended that all memoranda, letters, notes, instructions, and other data that were relevant to the stipulation and the compromise settlement were the "work product" of the attorneys for the Department of Justice and thus privileged material protected by Order No. 381-67 of the Attorney General, effective July 4, 1967.

Pursuant to an order of the Commission, the defendant furnished the Commission with the correspondence between the Department of Justice and the Bureau of Land Management in Denver, Colorado, relative to the preparation of Schedule 1 of the stipulation. The letters were relevant only to the extent that they corroborated the testimony of Dr. Wilkinson (attorney for plaintiff and signatory to the stipulation) as to why the word "diligence" was used in the stipulation. The letters did not relate to any matters which might reveal the intention of the defendant at the time of signing of the stipulation.

There is only one attorney now living who participated on behalf of the defendant in the settlement negotiations and execution of the stipulation. His affidavit related that without the memoranda which he prepared (but of which he does not have copies) or any other settlement papers he does not have any independent recollection concerning the defendant's intention. The government, relying on the Attorney General's Order relating to the production or disclosure of department materials and information, has withheld all memoranda, notes, or letters which might relate to the defendant's intention or which might have

refreshed the recollection of the government's then attorney. Accordingly, the Commission has no evidence introduced by defendant upon which to base any finding of fact as to the defendant's intention.

The following additional findings of fact are based solely on the evidence taken by the Commission pursuant to the order of remand:

21. On May 15, 1967, the Court of Claims remanded this case to the Commission with the following order:

> "NOW, THEREFORE, IT IS ORDERED that this case be and is hereby remanded to the Indian Claims Commission with instructions to hear additional evidence, including but not limited to testimony of the signatories to the stipulation mentioned above, and to make and report to this court findings of fact on the question as to whether by said stipulation, it was the intention of the parties thereto that the final judgment entered in Court of Claims Case No. 46640 would be *res judicata* as to the land involved in this case."

22. On April 23, 1968, a hearing was held before the Commission pursuant to this order of remand.

Plaintiff presented testimony of Dr. Ernest L. Wilkinson, partner of the law firm of Wilkinson, Cragun and Barker and a signatory to the stipulation in Case No. 46640. Plaintiff also presented the testimony of Georgette Betor Lee Hall who, together with the late Charles D. Lee, prepared Schedule 1 identifying the lands which formed the basis of the settlement in Case No. 46640.

23. Dr. Wilkinson testified that he was attorney of record for the Confederated Bands of Ute Indians in Case No. 46640 and in the related Case No. 45585, and as such was familiar with the course of negotiations leading up to the settlement of Case No. 46640, as well as Case No. 45585. He noted that Royce Area 616 was involved in both Cases Nos. 46640 and 45585. In Case No. 46640 the Confederated Bands were suing for compensation for lands that had been disposed of in Royce Area 616 prior to 1938. In Case No. 45585 they were

suing for compensation for lands that were undisposed of in 1938 and were taken by the Act of Congress of June 28, 1938 (52 Stat. 1209).

24. Dr. Wilkinson testified that the schedule of land disposals forming the basis of the settlement in Case No. 46640 (the aforementioned Schedule 1) was prepared by Georgette Betor (now Georgette Betor Lee Hall) and Charles D. Lee, who were hired with the approval of the Court of Claims and the Department of Justice. Miss Betor and Mr. Lee were specifically instructed to list only lands located in Royce Area 616 and not those in Royce Area 617 because, according to Dr. Wilkinson, referring to his legal conclusion at the time the list was made, "in our judgment the lands in 617 were taken under the Act of 1895 from the Southern Utes whereas the lands in 616 which were included in the stipulation were taken under the Act of 1880 from the Confederated Utes."

Dr. Wilkinson also testified that he hired Miss Georgette Betor and Mr. Charles D. Lee to prepare a list of disposals of lands involving the Southern Ute Reservation, located in Royce Area 617, separate and apart from the list of disposals of land which they prepared for Case No. 46640. Dr. Wilkinson stated that at the time of settlement of Case No. 46640 he had two lists of land disposals in hand:

(a) the list of disposals in Royce Area 616 which became Schedule 1 in Case No. 46640, and

(b) the list of disposals of the Southern Ute lands in Royce Area 617 which was used as a basis for preparing the petition in Indian Claims Commission Docket No. 328.

25. Dr. Wilkinson testified that in his judgment the reason the word "diligence" was employed in the stipulation in Case No. 46640 was to insure that any small areas of land not included in Schedule 1 of the stipulation would be covered by the judgment. He testified further that "diligence" in his opinion would not have permitted the exclusion of an area of 360 sections of land, an area equivalent to one mile wide and 360 miles long.

26. After Schedule 1 of the stipulation had been prepared by Miss Betor and Mr. Lee, it was submitted to

the Department of Justice for verification. Some errors were found by the Department and Schedule 1 was accordingly corrected. A letter dated May 8, 1950, from C. V. Marmaduke, Jr., Special Assistant to the Attorney General, Lands Division, tends to corroborate Dr. Wilkinson's testimony as to his intention of including the following language in the stipulation: "So far as the parties with due diligence have been able to determine these descriptions in Schedule 1 represent all of the land so disposed of and set aside." The letter, relating to Case 46640 reads as follows:

> "Sir:
>
> "In a recent telephone conversation Mr. Sonosky of the Department requested an opinion on the advisability of making a complete check of the land descriptions furnished by the plaintiffs in the above case.
>
> "While numerous errors were disclosed by the 10% spot check of the land descriptions, yet it appears that a complete check would not be warranted because the draftsmen's estimate of the amount of acreage erroneously described would be small. * * *"

27. Dr. Wilkinson, after testifying as to the steps he had taken to refresh his recollection, testified as follows in describing his intention in signing the stipulation in Case 46640:

> "Well, it was clearly my intention in signing the stipulation for the Confederated Bands of Ute Indians that it relates only and solely to the lands in Area 616 and did not relate to the lands in 617 which was to be the basis for a separate suit which we were preparing at the time. We had, of course, Miss Betor and Mr. Lee prepare the list in 616 and also the list in 617 and to the extent that you can read the mind of attorneys on the other side, I give it as my judgment and opinion that they were of the same opinion because, in discussing the schedule No. 1 which is attached to the stipulation we always discussed it solely with reference to the land in 616 and not in 617."

28. A letter from Dr. Wilkinson to Miss Betor and Mr. Lee, dated January 25, 1950, employing them to prepare a schedule of lands in Royce 617 in the same manner in which they prepared Schedule 1 for Royce 616, would tend to corroborate the testimony of Mr. Wilkinson. The relevant language reads as follows:

"It is possible that we may not be able to include the above claims under any of the suits we now have pending. If not, we will have to institute new suits, which we will do, however, immediately on your completing your work, and they can be completely prosecuted as quickly as if suit had already been filed. Please therefore be in keeping your record of time use the above caption on this letter."

29. A. Devitt Vanech and Marvin J. Sonosky signed the stipulation for the defendant. Mr. Vanech is dead. Also one of the principals for the Government, Mr. Robert E. Mulroney, then Chief of the Trial Section, Lands Division, Department of Justice, is dead. Mr. Marvin J. Sonosky filed an affidavit with the Commission. He stated he was the attorney in charge of the Ute litigation identified as Cases 45585, 45783, 46640, 47564 and 47566, all in the United States Court of Claims. He stated that in 1950 he prepared for the consideration of the Assistant Attorney General memoranda to the Attorney General recommending settlement; that he did not retain and does not have a copy of the memoranda of settlement or any other settlement papers; that he does not have any independent recollection of whether the settlement included the extinguishment of any claims for the Colorado reservations lands known as Royce No. 617.

30. In conclusion it was not the intention of Dr. Wilkinson to include Royce Area 617 at the time he signed the stipulation in Case 46640. There is no evidence as to the intention of the attorneys who signed the stipulation on behalf of the Government. The only inference that can be drawn as to their intention was the testimony of Dr. Wilkinson that at no time during the long period

of negotiation did either he or the attorneys for the Government discuss the question of disposition of Royce Area 617.

/s/ Jerome K. Kuykendall
JEROME K. KUYKENDALL
Chairman

/s/ John T. Vance
JOHN T. VANCE
Commissioner

/s/ Richard W. Yarborough
RICHARD W. YARBOROUGH
Commissioner

/s/ Margaret H. Pierce
MARGARET H. PIERCE
Commissioner

/s/ Brantley Blue
BRANTLEY BLUE
Commissioner

[Title Omitted in Printing]

* * * *

ORDER TRANSMITTING FINDINGS OF FACT TO THE COURT OF CLAIMS

This matter comes before the Commission at this time on an order entered by the United States Court of Claims on May 15, 1967, remanding this case to the Commission to hear additional evidence, including but not limited to testimony of the signatories to the stipulation in Court of Claims Case No. 46640, and to make and report to the Court of Claims findings of fact on the question as to whether by said stipulation, it was the intention of the

parties thereto that the final judgment entered in Court of Claims Case No. 46640 would be *res judicata* as to the lands involved in this case. Pursuant to the Court of Claims order the Commission has this date entered supplementary findings of fact numbered 21 through 30 and

IT IS ORDERED that the findings of fact made by the Commission pursuant to the order and remand from the Court of Claims are hereby transmitted to the Court of Claims.

Dated at Washington, D. C., this 27th day of June, 1969.

/s/ Jerome K. Kuykendall
JEROME K. KUYKENDALL
Chairman

/s/ John T. Vance
JOHN T. VANCE
Commissioner

/s/ Richard W. Yarborough
RICHARD W. YARBOROUGH
Commissioner

/s/ Margaret H. Pierce
MARGARET H. PIERCE
Commissioner

/s/ Brantley Blue
BRANTLEY BLUE
Commissioner

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 7-66

Ind. Cl. Comm. Docket No. 328

17 Ind. Cl. Comm. 28

21 Ind. Cl. Comm. 268

(Decided March 20, 1970)

THE UNITED STATES

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS

W. Braxton Miller, with whom was *Assistant Attorney General Shiro Kashiwa*, for appellant.

Glen A. Wilkinson, attorney of record for appellees. *Wilkinson, Cragun & Barker*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

NICHOLS, *Judge*, delivered the opinion of the court:

This case comes to us on appeal from a decision of the Indian Claims Commission which, in an interlocutory order dated May 16, 1966, found the appellant, the United States, liable to the appellee, the Southern Ute Tribe or Band, for (1) just compensation for taking 230,547.44 acres of land, and for (2) a "further and complete" accounting for funds held in trust. Although notice of appeal was filed on August 4, 1966, after briefing and oral

argument we remanded to the Commission for supplemental findings of fact. Upon making the requested findings the Commission again transmitted the case to us, whereupon the parties, relying on earlier submitted briefs, again presented oral argument. Since the Commission's supplemental findings tended to support its original decision, the issues now on appeal are those previously posed.

The Southern Utes, an incorporated tribe composed of the Moache and Capote bands, allege that the United States violated a treaty agreement made with their ancestors and ratified by Congress in 1895. Briefly, the terms of the treaty, which are not in dispute, provided that the western sector of the Southern Ute reservation be set aside for all those who would not accept allotments in severalty. The eastern sector was for Southern Utes who would accept allotments. The unallotted lands in this latter sector were to be opened to white settlers for the cash price of not less than $1.25 per acre. All proceeds, save certain offsets, were to be held by defendant in trust for the exclusive benefit of the Southern Utes. In April 1899, these lands were officially opened to public entry (31 Stat. 1947). In May 1900, however, Congress passed the Free Homestead Act (31 Stat. 179, 43 U.S.C. 179) which allowed settlers to obtain this land without monetary consideration. The Southern Utes now seek just compensation for 230,547.44 acres of their land that defendant thus donated to homesteaders in violation of the 1895 treaty. Defendant's primary defense is that all claims relating to these free land dispositions have been settled finally by prior adjudication. We disagree with this contention for the reasons stated in the following discussion and analysis.

In the mid-1800's, the Ute Indians occupied an extensive region which spanned western Colorado, northern New Mexico and Utah. On March 2, 1868, these Indians —the Tabequache, Moache, Capote, Weeminuche, Yampa, Grand River and Uintah Bands of Utes—ceded their aboriginal lands to the United States in exchange for a 15.7 million acre reservation situated wholly within the boundaries of Colorado. (Treaty of 1868, 15 Stat. 619, 2 Kappler 990). Subsequently, the bands came to be

known under different names: The Tabequaches were called the Uncompahgre Utes; the Moache, Capote *and* Weeminuche, the Southern Utes; and the Yampa, Grand River and Uintah, the White River Utes. Collectively these three Bands were informally organized and styled as the Confederated Bands of Utes.

Some years after the Treaty of 1868 another agreement was forged—the Brunot Cession of 1873. (18 Stat. 36, 1 Kappler 151). The discovery of large and valuable mineral deposits on the Ute Reservation had prompted the United States to persuade the Confederated Bands to cede 3.7 million acres of the east-central portion of their reservation. The relevance of this agreement lies in the geographical consequences it effected. (For convenience, in referring to these geographical sectors we will use the Royce Area numbers taken by the parties form Charles C. Royce's Map of Colorado (1) *Indian Land Cessions* (18th Ann. Rep., B.A.E. 1896-1897, Part II)). By carving out this slice of land (Royce Area 566), the cession nearly severed the original 1868 reservation into two disproportionate parts. Royce Area 616, the larger part, lay mostly north of 566, but a corridor 20 miles across ran north and south between 566 to the east and Utah to the west. Wedged between the New Mexico border and the southern boundary of the Brunot Cession, however, was the remainder of the reservation (Royce Area 617). This narrow strip, 15 miles across, ran from the reservation's eastern boundary to a point just 20 miles short of the Utah border, its western boundary. The occupants of Royce Area 617 were and still remain the Moache, Capote and Weeminuche Bands, then known as the Southern Utes.

By another agreement ratified by the Act of June 15, 1880 (21 Stat. 199, 1 Kappler 180), the Confederated Bands ceded, or purported to cede, with certain exceptions, the remainder of their diminished 1868 reservation. Because of the critical importance of this cession, we quote the pertinent sections verbatim.

* * * *

The * * * chiefs and headmen of the confederated bands of Utes * * * agree and promise to use their best endeavors with their people to procure their consent *to cede to the United States all the territory of the present Ute Reservation in Colorado, except* as hereinafter provided for their settlement.

The Southern Utes agree to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico.

The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity in the Territory of Utah.

The White River Utes agree to remove to and settle upon agricultural lands on the Uintah Reservation in Utah.

* * * *

The said chiefs and headmen of the confederated bands of Utes promise to obtain the consent of their people to the cession of the territory of their reservation as above on the following express conditions:

First. That the Government of the United States cause the lands so set apart to be properly surveyed and to be divided among the said Indians *in severalty* * * *.

* * * *

Second. That so soon as the consent of the several tribes of the Ute Nation shall have been obtained to the provisions of this agreement, the President of the United States shall cause to be distributed among them in cash the sum of sixty thousand dollars of annuities * * *, and so much more as Congress may appropriate for that purpose; and that *a commission shall be*

sent to superintend the removal and settlement of the Utes, and to see that they are well provided with agricultural and pastoral lands sufficient for their future support, and upon such settlement being duly effected, that they are furnished with [other necessities], and that the money to be appropriated by Congress for that purpose shall be apportioned among the different bands of Utes in the following manner: *One-third to those who settle on the La Plata River and vicinity [the Southern Utes]*; one-half to those settling on Grand River and vicinity [Uncompahgre Utes], and one-sixth to those settling on the Uintah Reservation [the White River Utes].

Third. That in consideration of the cession of territory to be made by the said confederated bands of the Ute Nation, the United States, in addition to the annuities and sums for provisions and clothing stipulated and [otherwise provided by law or treaty], agree to set apart and hold, as a perpetual trust for the said Ute Indians, a sum of money, or its equivalent in bonds of the United States, which shall be sufficient to produce the sum of fifty thousand dollars per annum, which sum of fifty thousand dollars shall be distributed per capita to them annually forever.

Fourth. That as soon as the President of the United States may deem it necessary or expedient, the agencies for the Uncompahgres and Southern Utes be removed to and established at suitable points, to be hereafter selected, upon the lands to be set apart, and to aid in the support of the said Utes until such time as they shall be able to support themselves, and that in the mean time the United States Government will establish and maintain schools in the settlements of the Utes, and make all necessary provision for the education of their children.

Fifth. [Prior treaties are reaffirmed.]

* * * *

Sec. 2 [Five Commissioners were authorized to present the agreement to the Utes for their ratification, and upon ratification to assess improvements and take a *census* of the Southern Utes, Uncompahgre Utes, and White River Utes]. * * * [A]nd they [commissioners] shall also select lands and allot them in severalty to said Indians, as herein provided, and superintend the removal, location, and settlement of the Indians thereon, and do and perform such other services as the Secretary of the Interior may consider necessary for them to do in the execution of the provisions of this Act.

* * * *

Sec. 3. *That the Secretary of the Interior be* * * * *authorized to cause to be surveyed, under the direction of said commissioners, a sufficient quantity of land in the vicinities named in said agreement, to secure the settlement and severalty of said Indians as therein provided.* And upon the completion of said survey and enumeration herein required, the said commissioners shall cause allotments of lands to be made to each and all of the said Indians, in quantity and character as set forth in the agreement * * * and whenever the report and proceedings of said commissioners * * * are approved by the President * * *, he shall cause patents to issue to each and every allotee for the lands so allotted, with the same conditions, restrictions and limitations mentioned therein as are provided in said agreement; and all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, *and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands,* at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided,* That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; *but shall*

be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the government for the benefit of said Indians, and then to be applied in payment for the lands at [$1.25] per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided in this act: * * *. (Emphasis supplied throughout, except usual statutory italics.)

* * * *

The most significant aspects to be gleaned from this Act, with respect to our analysis, is that the Confederated Bands (Southern Utes included) seemed to cede their *entire* Colorado reservation—Royce Area 616 *and* 617—and moreover promised to accept allottments in severalty in various sectors within and beyond reservation boundaries. As sole consideration for these promises, the Bands were to receive shares in the proceeds of unallotted land sales remaining after certain Government reimbursements. The Southern Utes were apportioned a one-third share and like their confederates understood that such monies would be held by defendant in trust for their benefit. The Commission found that the Act of 1880 "reserved" Royce Area 617 for the Southern Utes. Although the plain language of the Act appears inconsistent with this finding, the following sequence of events capped by the Act of 1895 and Restoration of 1938 (both discussed *infra*) support the conclusion that plaintiffs at any rate did not cede their reservation (Royce Area 617) under the agreement of 1880.

Pursuant to the above act the Ute Commission was formed under the leadership of chairman George W. Manypenny. On November 21, 1881, the Commission submitted its report to the Secretary of the Interior (H.R.

Doc., Vol. 10, Ser. No. 2018, 47th Cong., 1st Sess. 383 (1882). Divided into three subreports, one for each band in the confederated trio, the report discloses that the removal of the Uncompahgre and White River Utes was not accomplished without some difficulty. Both bands, despite the terms of the above treaty, resisted removal with vehemence. Finally, however, they were persuaded to settle in Utah, outside the bounds of their former reservation. The Southern Utes, on the other hand, were to receive different treatment as forecast by the comments of Chairman Manypenny:

* * * *

> When I went to the Southern [Ute] Agency, I found the prevailing opinion was that all the Southern Utes by the terms of the [1880] agreement were to be removed to and located on the La Plata River in Colorado and New Mexico. It was confidently expected that in a brief time the valleys of the Animas, Florida, and Las Pinos, &c., would be open to occupation and settlement by white people. The settlers in these valleys north of the reservation were impatient to enter and possess the land; and when it became known that I had instructed the contractors for surveying, on the completion of their work on the La Plata to pass over to and commence work on the Animas and Florida, there was not only disappointment, but great dissatisfaction manifested. It was asserted that I had deliberately perverted the language of the [1880] treaty and committed a great wrong.
>
> Under the terms of the agreement there was no other land in Colorado that I could have selected upon which to locate these Southern Utes. This I regard as a great misfortune, since their close proximity to the white settlements in the valleys of the streams on which they are to be located will subject the Utes, after their lands are assigned to them and patents issued, and the residue of the lands are opened to occupation and settlement, to constant annoyance by evil-disposed persons.

* * * *

> * * * During my stay on the reservation I took occasion * * * to talk to the leading men * * * on the subject of their location in severalty. In these conversations I called their attention to the fact that the work the surveyors were doing was the preliminary step to such location [in severalty] and the placing of each family on its own land. On many occasions all that I said was listened to without a single word in response, and I did not find one who desired a house, or would agree to dwell in one if built for him on his own land. It will take time and careful management to induce these Indians to abandon their present [way of living] and adopt the new mode of life contemplated by the agreement.
>
> In the meantime, and while the change is going on, they must be protected from annoyance. Intruders must be prevented from going in among them. If this be not done disorder will eventually reign, and all efforts to domesticate them will fail. *To prevent intrusion and guarantee proper order and protection, I can see no other way than to so modify the* [1880] *agreement, so far as these Indians are concerned, as to maintain the exterior lines of the strip of land one hundred miles long and fifteen wide, and preserve all the land within these lines for an indefinite period as an Indian reservation, and let the United States laws in relation to Indian reservations have full force therein. Then the land selected, and upon which the Indians are to be located, can be kept free from intruders. Id.* at 393. (Emphasis supplied).

Although we stated earlier that the plain words of the 1880 treaty seemed to indicate that the Southern Utes agreed to cede their lands to the United States, Manypenny's recitals give us some pause. They show that both sides regarded the 1880 agreement as not in effect as to the Southern Utes, pending further measures. By suggesting that the reservation be closed to public entry indefinitely, Manypenny impliedly suggests that the United States forego, albeit not permanently, its rights under the 1880 treaty vis a vis the Southern Utes. Significantly, Manypenny's recommendation to modify the

1880 treaty was accepted by the full commission. The record contains, however, no official acknowledgement or response.

Consequent to the departure of the Uncompahgre and White River Utes from Royce Area 616, Congress promulgated the Act of July 28, 1882 (22 Stat. 178), which declared all of Royce Area 616 as public land to be disposed of in accordance with the Act of 1880. Section 2 of the Act of 1882 provided, however, that the Secretary of the Interior "at the earliest practicable day, ascertain and establish the line betwen [Royce Area 616 and the land] now or lately occupied by the Southern Utes * * *." Five hundred dollars was appropriated for this survey. Section 3 provided among other things that the land opened in Royce Area 616 would only be disposed of on a cash basis not less than $1.25 per acre.

Plaintiff argues that by section 2 of the above act the United States formally recognized the thin strip of land (Royce Area 617) as the exclusive reservation of the Southern Utes. Defendant explains this survey as merely an attempt to cordon off the Southern Utes' land "until they could be located in severalty."

To implement the Act of 1882 the Secretary of the Interior was obligated to instruct the district land offices in Royce Area 616 how to accomplish disposal. From the text of a letter dated August 4, 1882, which ostensibly was sent out for this purpose under the approval of the Secretary of the Interior (Report of the Sec. of Int., Vol. 1, H.R. & Sen. Message & Doc., 47th Cong., 2d Sess. 41 (1882)), we have the following:

* * * *

> The second section of the act of 1882 provides for a survey of the line between the lands occupied by the Southern Utes and the Ute lands exposed to entry by the act [of 1882]. The following is a description of the line which is laid down on said map: Commencing *at* the southwest corner of the Ute *ceded* lands; thence extending the south *boundary* of the Ute *ceded* lands to the western boundary of the State of Colorado. (Emphasis supplied).

From this description it would seem that the Interior Department at least was already viewing the Southern Ute territory as a permanent reservation not ceded under the terms of the 1880 cession. Specifically, the letter states that the survey line commence *at*, not *in*, the southwest corner of the ceded Ute land. Adhering to defendant's contention that *all* the lands were ceded in 1880, a literal interpretation of this letter would lead to an anomalous result. If the starting point was placed *at* the southwestern corner of Ute ceded land, the point would coincide with the converging point of the New Mexico, Colorado and Utah borders. The line could not extend to the western boundary of Colorado because it would start there.

It is also interesting to note how the Southern Utes themselves regarded their status during this time. In February of 1886, Ignacio, the principal chief of the Southern Utes visited Washington, D.C., along with several other of his subordinate chiefs and headmen, and appeared before the Senate Committee on Indian Affairs. The following is a colloquy between the committee and Buckskin Charley who although a subordinate to Ignacio, seemed to perform as spokesman for the Southern Utes (Sen. Rep. No. 836, 49th Cong., 1st Sess. 1-2 (1886)):

> Question. Why do you come here for?
> Answer. We come here to see if we cannot exchange our reservation for another.
> Q. Where do you want the new reservation located?
> A. We want to go west of the present reservation.
> Q. Why is it better to go that way?
> A. The present reservation is narrow and long and we want to go west *and see if we can't sell it.*
> Q. Do you come to Washington with the idea that the Indian Bureau can do what you want?
> A. We come expecting to get legislation.
> Q. You hold title under statute?
> A. *Yes. Id.* (Emphasis supplied).

Thus the Southern Utes were still in possession of their part of their old reservation under claim of right. The Southern Utes wanted to quit their reservation for a number of reasons. These were pastoral people not inter-

ested in farming—the li
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amount of arable land.
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Secretary of the Interio
Atkins, Commissioner of
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ivelihood which the Government adopt. Even if they willing to n encompassed an insufficient They complained also that the and the location too isolated from neighbors. Their principal lament, sing encroachments by neighbor- equent to the Brunot Cession of 2 opening up the bulk of the Utes' ere was an influx of white set- he Southern Ute reservation. To New Mexico, which was also being us the Indians were wedged be- unities whose routes of trade and everal rivers traversing the reser- was in a quandary. In a report to ior dated April 5, 1888, J. D. C. f Indian Affairs acknowledged the o. 836, *supra*, at p. 3):

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> to impossible to close up the thor- he reservation. To do that would be wall" 110 miles long, virtually cut- and intercourse between the large nmunities on either side of the res- as a matter of fact, we are bound tipulations [Sec. 2 of Act of 1882?] s to prevent white people from en- ossing said reservation.

Two bills were subse
S. 769 and S. 1916—
Southern Utes from th
never enacted into law
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pler 266) reads as fol

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equently introduced in the Senate—to effectuate the removal of the their reservation. These bills were and it was not until 1888 that the e steps to ameliorate the Indians' e Act of 1888 (25 Stat. 133, 1 Kap- ollows:

> of the Interior is hereby authorized
> mmission * * * with authority to
> he band of [Southern] Ute Indians
> nodification of their treaty [1880?]

> and other rights, and such exchange of their reservation, as may be deemed desirable by said Indians and the Secretary of the Interior; and said commission is also authorized, if the result of such negotiations shall make it necessary, to negotiate with any other tribes of Indians for such portion of their reservation as may be necessary for said band of [Southern] Ute Indians * * * if said Indians shall determine to remove from their present location; the report of said commission to be made to and subject to ratification by Congress before taking effect; * * *.

Plaintiffs assert that this act confirmed the "separation of the Southern Utes, as an entity, from the Confederated Bands * * *." That the Government negotiated exclusively with the Southern Utes for the "exchange of their reservation", is construed by plaintiffs "as a further Congressional recognition that the 15 mile strip [Royce Area 617] was the sole and absolute property of the Southern Utes and that they alone had the right to dispose of it." Perhaps believing it to be damaging to its case, defendant omits all reference to this act in its brief. Although the language of this act tends to favor plaintiffs' position it is by no means conclusive. It merely authorized the establishment of a commission to engage the Southern Utes in negotiations for the purpose of persuading them to do belatedly what the Uncompahgre and White River Utes had done some years earlier, namely, to vacate their reservation and move elsewhere. A reasonable explanation for the act's exclusive terms is that the Southern Utes were the only band of the confederation as to whom the 1880 agreement was still executory. The agreement which emerged pursuant to this act substantiates this view. The Southern Utes agreed, *for no additional consideration*, to give up their reservation and remove and settle upon a reservation in San Juan County, Utah. Presumably, their evacuated reservation lands would then be sold in accordance with the Act of 1880 and the proceeds would be held for the collective benefit of the Confederated Bands in the prescribed proportions, that is, the consideration vis-

ualized in the 1880 agreement as accruing to the Southern Utes would still accrue.

Although routinely introduced, this agreement failed to receive Congressional approval; for six years it remained in limbo much to the dismay of the Southern Utes who continued to occupy their besieged reservation. In 1894 it was again introduced. Conceding the "anomalous position [of the Southern Utes] of having ceded their reservation and yet remaining on it", the Senate Committee on Indian Affairs favored ratification (Sen. Rep. No. 279, 53d Cong. 2d Sess. 2-3 (1894)). Its House counterpart, although concurring in the view that the Southern Utes presented an anomalous situation, did not assent to ratification (H.R. Rep. No. 799, 53d Cong., 2d Sess. 2-3 (1894)). It believed that the proposed reservation was too large for the Southern Utes and hence would encourage their nomadic ways. Therefore, instead, the House Committee recommended enactment of a pending bill which was eventually passed as the Act of February 20, 1895 (28 Stat. 677). The stated purpose of this Act was to annul the agreement of 1888 and enforce the treaty of 1880 which sought to settle the Indians in severalty. Since this, too, is a very important Act, the pertinent language will be quoted verbatim:

* * * *

> Sec. 2. That within six months after the passage of this Act the Secretary of the Interior shall cause allotment of land, in severalty, to be made to such of the Southern Ute Indians in Colorado as may elect and be considered by him qualified to take the same out of the agricultural lands embraced in their present reservation in Colorado, such allotments to be made in accordance with the provisions of the Act of [1880] * * * and the amendments thereto, as far as applicable hereto, and the treaties heretofore made with said Indians: *Provided*, That Indians taking allotments as herein provided shall retain their interest in all tribal property.
>
> Sec. 3. That for the sole and exclusive use and occupancy of such of said Indians as may not elect or be deemed qualified to take allotments of land in sev-

eralty, as provided in the preceding section, there shall be * * * set apart and reserved all that portion of their present reservation lying west of the range line between ranges thirteen and fourteen west of the New Mexico principal meridian, and also all of townships thirty-one and thirty-two of ranges fourteen, fifteen, and sixteen west of the New Mexico principal meridian and lying in the Territory of New Mexico, subject, however, to [certain government rights] * * * ; and the Goverment shall maintain an agency at some suitable place on said lands so reserved.

Sec. 4. That at the expiration of six months from the passage of this Act the President * * * shall issue his proclamation declaring the lands embraced within the present reservation of said Indians except such portions as may have been allotted or reserved under the provisions of the preceding sections of this Act, open to occupancy and settlement, and thereupon said lands shall be and become a part of the public domain of the United States, and shall be subject to entry under the desert, homestead, and town-site laws * * *; but no homestead settler shall receive a title to any portion of such lands at less than [$1.25] per acre, and shall be required to make a cash payment of 50 cents per acre at the time filing is made upon any of said lands: [certain provisos follow] * * *.

Sec. 5. That out of the moneys first realized from the sale of said lands so opened up to public settlement there shall be paid to said Indians the sum of fifty thousand dollars as follows: Five thousand dollars annually for ten years * * * to be divided equally among all of said Indians per capita, irrespective of age or sex; also the sum of twenty thousand dollars of said proceeds shall be paid to the Secretary of the Interior, who shall invest the same in sheep and divide the said sheep among the said Indians per capita equally, irrespective of age or sex; [certain allotments also made to specific chiefs and headmen] * * *; *that the balance of the money realized from the sale of lands, after deducting expenses of sale and survey, shall be held in the Treasury of the*

United States in trust for the sole use and benefit of said Southern Ute Indians. That nothing herein provided shall in any manner be construed to change or interfere with the rights of said Indians under any other existing treaty regarding any annuities or trust funds or the interest thereon.

Sec. 6. That the foregoing provisions of this Act shall take effect only upon the acceptance thereof and consent thereto by a majority of all the male adult Indians now located or residing upon the reservation, which acceptance shall be at once obtained under such regulations as the Secretary of the Interior may prescribe. (Emphasis supplied.)

The Southern Utes could have allotments in severalty in Area 617, those who did not take these would move to a reservation in the western sector of Area 617; unallotted eastern sector lands would be sold not donated to homesteaders, for the Southern Utes' benefit. Unlike the Act of 1888, the Act of 1895 employs language ostensibly consistent with the Act of 1880 but it effects a conflicting result with the latter. We said earlier that by the plain terms of the Act of 1880, the Confederated Bands including the Southern Utes agreed to cede their entire Colorado reservation (Royce Area 616 and 617) for consideration. Under the Act of 1895, however, the Southern Utes separately ceded all over again a part of their reservation (Royce Area 617) in exchange for an *exclusive* and *additional* consideration! Section 5 not only states that the balance of land sales proceeds, deducting certain Government expenses shall be held in the U.S. Treasury for the sole use and benefit of the Southern Utes, but also that no offsetting reductions should be made in their rights under prior treaties because of this consideration. The meaning to be ascribed this section is a focal point of controversy between the parties.

The Commission found, subscribing to plaintiff's position, that the United States after the Act of 1880 pursued a patterned course of conduct which at all times regarded the Southern Utes as the rightful owners of Royce Area 617. This conduct culminated in the agreement of 1895 which the Commission viewed as an "ultimate act"

recognizing plaintiffs' ownership rights. Defendant contests this appraisal by offering one of its own. It contends that the additional consideration was actually "special benefits" gratuitously given the Southern Utes to induce them to take lands in severalty. The benefits, defendant admits, were proferred "at the expense of the United States and other Ute Bands."

Although it is debatable, we believe the evidence weighs substantially in favor of the Commission's interpretation. We are not persuaded that defendant's post 1880 conduct followed any clear direction. It was ambivalent, with some actions favorable to plaintiffs' case and others not. During all this time, however, the fact remains that the Southern Utes were allowed to remain on their surveyed reservation for 15 years after the purported cession, and the right to remove them without their further consent was not asserted or exercised. Here we have an interpretation given to the 1880 treaty by both parties thereto. Congress recognized this anomalous situation and deemed it necessary to tender new consideration for the land. Defendant's "special benefits" theory is supported neither by the express language of the Act nor by the legislative history surrounding its passage. Although earlier reports described the Uncompahgre and White River Ute removals as somewhat hostile, due to their unwillingness to leave, Congress did not think it necessary then to encourage their exodus with monetary inducements. On the contrary, it was reported by the Commissioner administering the White River Utes that military force was contemplated in accomplishing their withdrawal. (H.R. Doc. Ser. No. 2018, *supra*. Given the relations which existed between the United States Government and American Indians during this period it is difficult now to view the former as acting *ex gratia* wholly. The Southern Utes at that time, numbered slightly over 1,000. Certainly, if the United States wanted to make a gift it could have done so and still fallen far short of the promises embodied in section 5.

The more tenable theory, in our estimation, is that Congress recognized that by its protracted acquiescence in the Southern Ute occupation, Government rights to the land

had somehow lapsed, or the agreement not being executed for so long a time, was rescinded and dead. It may be that the obligation to deal justly and honorably with the Indian wards did not allow insistence on full implementation of the apparent terms of the 1880 agreement. On the other hand, the Southern Utes obviously did not see themselves as mere squatters. The Congress therefore decided that if the land was going to be acquired free and clear new consideration was necessary. Hence we find section 5 of the 1895 agreement to be an explicit waiver of the Government's rights created in the 1880 agreement, whatever they were. It follows then that the Southern Ute lands in controversy were ceded in 1895 not 1880.

This position is bolstered by the Restoration of 1938 (5 Kappler 659), which the Commission found as defendant's second ultimate act in recognizing plaintiffs' ownership rights. In an order by the Secretary of the Interior issued pursuant to sections 3 and 7 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) the Southern Utes were restored to their tribal ownership of all lands not disposed of under the Act of 1895. The first paragraph of this order reads as follows:

> * * * [P]ursuant to the provisions of the Act of February 20, 1895 * * * the Southern Ute Band of Indians in Colorado *ceded* to the United States a large area of their reservation in the State of Colorado established *expressly for their benefit under the treaty of June 15, 1880* * * *. (Emphasis supplied).

Thus, defendant's officials do not only concede that the lands were ceded in 1895, but they also enlighten us as to the status it retrospectively applied to the 1880 agreement. Such a statement by an executive agency bearing on the meaning of a treaty must be accorded great weight. *Creek Nation East of the Mississippi* v. *United States*, 165 Ct. Cl. 479, 486, *cert. denied*, 379 U.S. 846, *reh. denied*, 379 U.S. 918 (1964).

I.

A. Defendant's principal contention that the Southern Utes' claims have been finally settled by prior adjudica-

tion evaporates in the presence of our conclusion. The cases upon which it relies, namely the 1910 accounting case No. 30360 (45 Ct. Cl. 440 (1910)) and the 1950 settlement case No. 46640 (117 Ct. Cl. 433, 436 (1950)), were both intended to settle claims arising out of the 1880 cession exclusively. The Jurisdictional Act of 1909 (35 Stat. 788) which enabled this court to hear the accounting claim of the Confederated Bands was expressly limited to claims arising out of the Act of 1880. Hence any claims exceeding the limits of this mandate which were adjudicated in the 1910 accounting were improvidently heard. Not so limited was the Jurisdictional Act of 1938 (52 Stat. 1209) which authorized the 1950 settlement cases. On the contrary, this act conferred jurisdiction upon us to adjudicate *all* legal and equitable claims which the Ute Indians or any individual tribe or band thereof may have against the United States as to claims arising under *any* treaty of the United States. The stipulation—the bulwark of defendant's case—upon which we entered judgment in case No. 46640, however, was qualified as follows:

> * * * [T]he judgment to be entered in this case is *res judicata* * * * as to any land formerly owned or claimed by the plaintiffs [Confederated Band of Utes] in western Colorado, *ceded to defendant by the Act of June 15, 1880* * * *. (Emphasis supplied.)

The stipulation recited numerous parcels in 616 and none in 617, though an effort was made for the list to be comprehensive. Since the Commission originally found that the agreement of 1880 only ceded land in Royce Area 616 it concluded summarily that this stipulation did not extinguish the instant claims.

We remanded this case to get a better idea of exactly what the parties meant to stipulate in 1950, namely, what they *then* thought was ceded by the Act of 1880. As reflected in the Commission's supplemental findings, plaintiffs' witness, a signatory to the stipulation and the then attorney of record for the Confederated Bands, gave testimony entirely consistent with the Commissioner's original findings. Defendant, however, insisting that the stipulation was self-explanatory and that the intent of

the parties would have to be discerned from the written instrument, declined to put on witnesses. Of the Government signatories, only one is still living—Marvin J. Sonosky, Esquire, who is a member of our bar and is now in private practice. Having no independent recollection of the precise extent of the stipulation, Mr. Sonosky was unable to give useful testimony. He did indicate, however, in an affidavit submitted to the Commission, that as the attorney in charge of the 1950 Ute litigation he prepared a memorandum recommending settlement. Defendant withheld from the Commission this memorandum and related papers declaring them to be the work products of the attorneys of the Department of Justice and therefore privileged under Order of the Attorney General No. 381-67 (July 4, 1967).

We have recently considered in *Weiss* v. *United States*, 180 Ct. Cl. 863 (1967), the question of privilege for papers and opinions prepared by attorneys in the executive branch. The topic is comparatively new and the case law still scanty. We do not believe the privilege should extend beyond the reasons for its existence, which are the freedom of the officials to receive staff advice in confidence, and the reluctance of courts to allow counsel in any lawsuit to raid and use the work product of his adversaries. Mr. Sonosky apparently needed to refresh his memory only, and introduction of his report in evidence was unnecessary. He was not in the employ of plaintiffs. The officials to whom Mr. Sonosky submitted his report, and who approved it, being dead, could not now be embarrassed. The report was not prepared for use in trial of the current or any then pending litigation, but was apparently to explain and justify a settlement. It certainly seems more than questionable whether executive privilege does or should apply to consultation by a witness of a document he himself has prepared, for the purpose of refreshing his memory. If defendant is right, by consistency it should have a privilege to muzzle Mr. Sonosky in case his memory should be adequate without refreshment, yet no such right is claimed or can be imagined. Defendant in this instance has clearly not done all it might have done to clear up any uncertainty there

may be about the intent of the parties to the stipulation. We think we are justified in inferring that neither party intended the stipulation to apply to Area 617. The most that can be said is that, by referring to territory ceded in 1880, the stipulation might have been intended to refer to the unexecuted, negated cession of Area 617, or it might not. If we must, as defendant urges, confine our view to the stipulation itself and other papers in that case, we find insufficient reason there to hold it applies to areas not *effectively* ceded. If we have a right to inquire directly into the understanding of the parties at the time, to resolve an ambiguity, defendant's handling of the Sonosky memorandum is pregnant with the admission that Mr. Sonosky, his memory refreshed, would not testify favorably to defendant. Since plaintiffs' testimony was unequivocal and no reason is suggested for disbelieving it, we conclude that the parties never intended the stipulation to apply to Area 617, and therefore it did not so apply.

B. Defendant's second defense is that plaintiffs, the Southern Utes who now only consist of the Moache and Capote bands, are not the exclusive owners of these claims. Specifically it contends that either the Uncompahgre and White River Utes have a joint interest in these claims, or alternatively that the Weeminuches, now known as the Ute Mountain Utes, are co-owners with plaintiffs. Because of this alleged failure to join interested parties, defendant, without citing precedent or other authority, urges reversal.

Responding to the first assertion, we find that the Uncompahgre and White River Utes have no interest in the instant claims. The 1895 agreement was made between the United States and the Southern Utes and only the latter were to have any share in proceeds. However apparently inequitable it may have been to grant the Southern Utes joint interest with the Uncompahgre and White River Utes in the Area 616 proceeds and then give them exclusive interest in Area 617 proceeds, this was the stated intent of Congress not to be disturbed presently by this court. Any claim these tribes might raise against the Government to redress this matter would emanate from a right other than that of beneficiaries under the Act of 1895.

Defendant's second contention, raises a more perplexing question. Plaintiffs insist that the Weeminuches, by accepting the western reservation offered in the 1895 agreement, relinquished all claim to any land in the eastern sector. By accepting allotment in the east, the Moache, and Capote similarly relinquished claims to western lands. Hence, plaintiffs assert that since the instant claims all arise out of eastern land dispositions, they, by this mutual exchange, own the exclusive rights. The Commission, without referring directly to this cross-relinquishment theory, concurred in plaintiffs' conclusion, 17 Ind. Cl. Comm. at p. 52, saying:

> * * * [A]ny claim which the Ute Mountain Utes might have * * * would be *separate* from the claim of petitioner. Petitioner herein claims no land in the present-day Ute Mountain Reservation. (Emphasis supplied).

Fortunately, we can decide this issue without reaching the merits. Although the Commission's rules of practice and procedure were then and still are silent as to joinder questions, we hold that joinder of parties before the Commission is required only if the joint interest is existing. Assuming *arguendo* that the Ute Mountain Utes once owned an interest in this claim, we believe that they forfeited it by failing to timely file a claim before the Commission. Not only is this holding literally consistent with our own Rule 62 (a) which dictates joinder of any persons "*having* a joint interest adverse to the United States" (Emphasis supplied) but, it also does no violence to the salient concepts which underlie the joinder of "indispensable" parties rule. By rendering a judgment for plaintiffs, we do not prejudice the claim of the absent Ute Mountain Utes since their claim is no longer extant. Accordingly, consequent to such judgment, defendant will not suffer any inconvenience or harassment of further litigating this issue. We therefore hold that the Southern Utes, consisting of the Moache and Capote Bands, are *presently* the sole and exclusive owners of the instant claims. Hence they are eligible to pursue their remedy without additional parties.

C. Defendant conceded at oral argument that should we find that plaintiffs' claims were not extinguished by the 1950 settlement, and should we find plaintiffs the sole owners of their claims, then it is liable for gratuitously giving away plaintiffs' land. Questions of quantum, however, are still raised by defendant. First, it contends that the Commission's finding that defendant is liable to compensate for 230,547.44 acres is not supported by substantial evidence. Second, in order to avoid payment of interest, it says it is liable, if at all, for breach of contract, rather than to pay just compensation for a 5th amendment taking.

Deferring the acreage issue for the Commission, we now explore the nature of defendant's liability. Plaintiffs argue that under the 1895 Act their ancestors ceded whatever interest they had in their lands in trust to defendant in exchange for a beneficial interest in the proceeds. Sustained by the Commission below, plaintiffs assert that the free disposal of their lands with no substitute consideration offered by defendant was a taking under the 5th amendment entitling them to the just compensation. Plaintiffs, in support of their position, cite several cases, but the one we find to be most in point is *Confederated Bands of Ute Indians* v. *United States*, 100 Ct. Cl. 413, 430 (1943).

Attached to the Jurisdictional Act of 1938, *supra*, was the so-called Adams Amendment which declared certain Ute land ceded under the Act of 1880 but not disposed of "to be the absolute property of the United States". In *Confederated Bands*, *supra*, we started with the proposition that "[t]he interest and obligations created by the agreement of 1880 do not fit readily into conventional legal concepts, such as trusts, agencies, debts or *contractual* obligations, and mortgages or security interests.", (p. 425), (Emphasis supplied). We went on to comment that "[t]he problem [was] further complicated by the fact that one of the parties * * * was a sovereign which could and did, regardless of the terms of the agreement, do what it pleased with the lands and their proceeds, giving the Indians the privilege of having their legal rights determined only at long intervals * * * when the sov-

ereign deigned to waive its immunity from suit.", (p. 425). In short, this was not the typical arms length contract relationship. Declining to consider whether the Government assumed the duty of trustee, we found that the Indians under the agreement of 1880 retained an interest in the land—the right to the proceeds from sales—and that this interest was destroyed by the enactment of the Adams Amendment. Given these circumstances we held the destruction of this right to be a taking under the 5th amendment. Presently we are confronted with a like set of circumstances. The agreement of 1895—patterned after the 1880 agreement—embodies rights and interests which similarly evade accurate legal classification. Again, as in *Confederated Bands*, we have a situation where the Government cavalierly exercised its sovereign power without giving thought to providing consoling justification, let alone immediate chance for redress. By the Free Homestead Act of 1900 (31 Stat. 179) defendant promised that "all sums of money so released [herein] which if not released would belong to any Indian tribe shall be paid to such Indian tribe by the United States * * *." By failing to make good this legislative promise of substitute consideration, defendant, in effect, dealt with plaintiff's land as its absolute property. Guided by our reasoning in *Confederated Bands*, we hold that plaintiffs, under the agreement of 1895, retained an interest in the ceded lands, namely, the right to receive sales proceeds or the equivalent thereof. As in *Confederated Bands*, this interest was destroyed by defendant's exercise of sovereign power. We hold therefore that the free disposal of the lands was a taking of plaintiffs' property right under the 5th amendment entitling them to just compensation.

This holding is not in conflict with *Confederated Salish & Kootenai* v. *United States*, 175 Ct. Cl. 451, *cert. denied*, 385 U.S. 921 (1966). The pertinent facts of that case are as follows: The Government in 1904 enacted legislation which authorized using plaintiff Indians' monies, held in trust, to defray the expenses of surveying their land. Since we had earlier found that by a prior treaty the Government had obligated itself to assume the cost of surveying, 167 Ct. Cl. 405 (1964), the issue subse-

quently presented was whether its use of Indian trust funds in violation of the treaty was a taking under the 5th amendment. We rejected this claim for two reasons: First, we noticed that since "legal title to the funds on deposit in the Treasury lay in the United States * * * [the] Indians' interest was, at most, that of a beneficiary, and a trustee's failure to live up to the standards imposed upon him is not a taking of title from the cestui but a breach of obligation.", 175 Ct. Cl. at p. 455. Our second reason, however, raised an even "deeper objection": "Money in the Federal treasury, even on deposit, cannot be simply equated with private property. Where such funds are involved it requires extraordinary circumstances, not present here, to find an eminent domain taking in a withholding or use of money by the Federal Government.", at pp. 455-56. We then proceeded to discuss the anomalous consequences plaintiffs' theory would engender with regard to "claimants who could show some sort of title to funds in the Treasury" and those who could not. We noted further that "[m]ere form sometimes has meaning, but usually not where, as here, the choice of forms seems haphazard and accidental. Considerations like these have impelled courts to shy away, generally, from designating the withholding or diverting by the defendant of funds in the treasury as an eminent domain taking.", at p. 456. Defendant argues here that its exempting of homesteaders from making cash payments and its failure to reimburse plaintiffs for loss of proceeds at most were breaches of contract or breaches of trust which, even if deplorable, do not constitute a 5th amendment taking. Defendant's breach of contract argument doubtless springs from our reasoning in *Confederated Salish*, wherein we noted, even though not argued by plaintiffs, that defendant's use of Indian monies for a project which it had earlier promised to finance itself was a breach of agreement, that plaintiffs' violated rights were contractual rights, and that the "taking away of *contractual rights*, via a rupture of the contract, is of course not equivalent to a taking of *property* under the Fifth Amendment.", at p. 455. (Emphasis in original). This is applicable to a mere breach of a contract but perhaps not to its overt repudia-

tion. *Lynch* v. *United States*, 292 U.S. 571 (1934). But, as we have held, we need not find that latter situation here since whatever the exact legal nature of the parties' interests and obligations under the 1895 agreement, they are more than contractual. Thus defendant's breach of trust argument must also fail. Admittedly, under the agreement of 1895, defendant promised to hold *monies* in trust for plaintiffs; hence, as to this *res* it might well have been called a trustee. Still unclear and unresolved, however, is defendant's status as to the *lands* in question. In our earlier interpretations of the Act of 1880, whose land disposal provisions are sufficiently interchangeable with those of the act at bar, we never described defendant as being an actual trustee as to the lands. Specifically, we said that it was unnecessary to classify the Government as a trustee as to the 1880 lands in question, 100 Ct. Cl. at p. 432, and that it occupied a position "comparable to a trust", 112 Ct. Cl. at p. 130. If defendant is correct in reading *Confederated Salish* as standing for the proposition that breaches of trust are ineligible *per se* for treatment as 5th amendment takings, then we reply that defendant was *not* or not solely a trustee as to the lands in question. To say otherwise would necessitate overturning our previous decision that the enactment of the Adams Amendment was a taking. It is obvious, however, from *Navajo Tribe of Indians* v. *United States*, 176 Ct. Cl. 502, 364 F. 2d 320 (1966) that the United States is not exonerated from paying interest, as for an eminent domain taking, merely because the obligations of the United States with respect to the Indian lands involved in the claim were denominated as being, among other things, those of a trustee.

Since each taking occurred when the ownership of a homesteader became final, *Creek Nation* v. *United States*, 302 U.S. 620-22 (1938), we leave it to the parties to decide whether to assume the burdensome task of fixing the date of patent for each homesteader and compute the damages individually, or rather, as suggested by the Commission, to fix an average date or dates for the takings and compute the damages generally.

II.

Plaintiffs' second claim in this case is for an accounting of funds collected by the defendant in the course of selling plaintiffs' land under the 1895 agreement. In their petition filed with the Commission on August 10, 1951, plaintiffs timely alleged a claim for an accounting for moneys received by defendant for some 81,953.18 acres of land disposed of in various ways other than as free homesteads. Responding to this claim, defendant submitted a General Accounting Office (GAO) report accounting for proceeds derived from sale of certain lands pursuant to the Act of 1895, together with an accounting of the interest on said proceeds during the period from February 12, 1929 to June 30, 1951. Plaintiffs, after studying this report, filed exceptions to its contents. These exceptions were filed on June 12, 1963. Amended exceptions were subsequently filed on September 30, 1963. The Commission, in its interlocutory order, declared that defendant should make a further and complete accounting in line with specified rulings on each of plaintiffs' exceptions.

Defendant contests this decision on procedural grounds but make no objection to the substance of any of the Commission's rulings on plaintiffs' exceptions. The procedural defenses are these: First, the accounting claim alleged in plaintiffs' originally filed petition was already rendered by prior adjudication. Second, the subsequent accounting claims amended in 1963 by way of exceptions were untimely filed additional claims. Hence the Commission under 25 U.S.C. 70(k) (1964) had no jurisdiction to rule on these claims. Third, the Commission's order for an up-to-date accounting was beyond its jurisdiction under 25 U.S.C. 70(a) (1964).

Regarding the first defense, we can dispose of it summarily. Since we have held that the 1950 settlement case No. 46640 was limited to settling accounts for the 1880 cession exclusively, we are compelled to find that plaintiffs' original accounting claim which derives from the agreement of 1895, was not included and is therefore still cognizable.

The second defense, however, does not admit to such easy disposition. Plaintiffs, perhaps content to rest on the

Commission's reasoning, made no response to it in their brief. The Commission excused plaintiffs' late pleadings even though it recognized that the exceptions raised general accounting claims not referred to in plaintiffs' original petition. Despite the difficulties stemming from the language of its enabling legislation—25 U.S.C. 70(k)—it reasoned that since plaintiffs could not have discovered any of their trustee's indiscretions until receiving the GAO report, this matter should be treated under the general legal principle that "limitations [do not] * * * begin to run until the aggrieved party knew, or should have known, that his trustee had created a cause of action through the handling of the trust moneys.", 17 Ind. Cl. Comm. at p. 54. This result was deemed particularly equitable in the light of defendant's "unique position" of not having to render periodic accountings to its "Indian wards". "It [the Government] should not," said the Commission, "be allowed to take advantage of that fact for its own protection". *Id.*

Although we agree with the Commission's resolution of this issue, we do not feel compelled to comment on its novel rationale. Rather it is our belief that plaintiffs' exceptions were merely amendments to their timely filed petition. *United States* v. *Northern Paiute Nation*, 183 Ct. Cl. 321, 328, 393 F. 2d 786, 790 (1968); *The Snoqualmie Tribe of Indians* v. *United States*, 178 Ct. Cl. 570, 585, 372 F. 2d 951, 959 (1967), and as such under the Commission's rule of procedure 13(c) they relate back to the time of original filing, thus curing the jurisdictional time bar defect. That the Commission itself did not similarly construe these exceptions is understandable, since its 1966 decision in this case was rendered without the guidance of the above mentioned cases. In *Snoqualmie* we allowed the late amendment because by the Snoqualmie's original petition the Government "was put on notice of the *possibility* that the Snoqualmie organization *might* expand the scope of its claim.", *Snoqualmie* at p. 589. (Emphasis supplied.) The same is true of the instant case. Admittedly plaintiffs' original petition requested an accounting for certain specified items. Responding to this petition, defendant submitted the GAO report but

not without expressly restricing its introduction to the issues of liability raised in the petition. This precautionary measure, which the Commission found correctly to be specious, indicated, in our opinion, that defendant knew from the outset that to adequately respond to plaintiffs' petition it would have to submit the GAO report which contained various ignoble confessions. That it declined to contest before the Commission the substance of plaintiffs' exceptions underscores its concession to the obviousness of its fiduciary misconduct disclosed in the report. We therefore find that the substance of plaintiffs' original petition put defendant on notice that it might have to defend against a broader claim. This finding was stated implicitly by the Commission, 17 Ind. Cl. Comm. at p. 55:

> We are of the opinion that the allegation for a specific accounting which brought forth the [GAO] accounting report and thereby revealed other and further apparent misuse of petitioner's funds, is a *sufficient basis* for requiring a further and complete accounting from defendant with regard to those items questioned by petitioner in its exceptions. (Emphasis supplied.)

Thus, following *Snoqualmie* and *Northern Paiute*, we hold that plaintiffs' exceptions relate back to the date of the original petition.

Defendant's third procedural contention is that the Commission's order for an up-to-date accounting report is beyond its jurisdiction. 25 U.S.C. 70(a) (1964) on its face bars the Commission from considering *any* claims accruing after August 13, 1946. In a previous interpretation of this section, however, we have said that where the Government's initial wrongdoing giving rise to a claim accruing before August 13, 1946, but continued past this time, the Indian Claims Commission was free to determine the extent of its jurisdiction in framing an award. *Gila River Pima-Maricopa Indians, et al.* v. *United States*, 135 Ct. Cl. 180, 186 (1956), 157 Ct. Cl. 941 (1962). We expressed agreement in that case with the established principle that "a court once having obtained jurisdiction of the persons and subject matter of

a suit, retains such jurisdiction for all purposes including the awarding of all damages accruing up to the date of judgment." We hereby reaffirm our adherence to this principle and hold the Commission correctly ordered an up-to-date accounting for continuing Government wrongdoings which predated and postdated the statutory time bar.

In view of the foregoing, we affirm as to the taking claim and all of the Commission's determinations related thereto, except for the finding that defendant is liable for just compensation for taking exactly 230,547.44 acres of land, the Commission having offered no explanation as to how it reached this figure. In remanding to the Commission the task of approving the amount of compensation due, we therefore do not restrict plaintiffs' recovery or fix defendant's liability at the 230,547.44 figure. We also affirm the Commission's decision as to the accounting claim. Accordingly, we return the case to it with the task of conducting the accounting consistent with rulings which were the subject of this appeal.

Affirmed and remanded.

SKELTON, *Judge*, dissenting:

I respectfully dissent. I cannot agree with the reasoning of the majority nor with the result they reach. In my opinion, the Indians in this case, along with other Southern Ute tribes, were paid $31,938,473.43 in 1950 for the identical land involved here, together with other lands. This was the largest judgment ever awarded by this court since it was established in 1855. The attorneys who represented the Indians in the recovery of this tremendous judgment received an attorney fee of $2,800,000. See *Confederated Band of Ute Indians* v. *United States*, 120 Ct. Cl. 609 (1951). As will be seen in the following pages, the same Indians and the same attorneys are before the court again in this case asking that they be paid again (twice) for the same land, and the opinion of the majority is going to allow them to get this double pay-

ment. This results, in my opinion, in a shocking give-away of millions of dollars of public money of the United States, and I cannot agree to it.

The overriding error in the opinion of the majority is the failure to honor the doctrine of *res judicata*. The crucial issue is whether the lands now at bar were included in the judgment of this court in *Confederated Bands of Ute Indians* v. *United States*, (Nos. 45585, 46640, 47564, 47566), 117 Ct. Cl. 433 (1950), in which, as stated above, the plaintiff and other Ute Indians were awarded over 31 million dollars in settlement of all of their claims, including those involving the lands in this case.

The judgment in No. 46640 (of over six million dollars) was entered pursuant to a stipulation signed by the attorneys for both parties to the law suit including the attorneys for the plaintiff in the present suit. Using language as clear and unambiguous as is possible in the English language, the plaintiff Confederated Bands (which included the present Southern Ute Band, appellee in the suit before us) entered into a complete release, extinguishment and settlement of any and all of their claims regarding the land then at bar. The parties agreed that:

> * * * [J]udgment * * * shall be entered in this cause as *full settlement and payment* for the *complete extinguishment* of plaintiffs' right, title, interest, estate, claims and demands of whatsoever nature in and to the land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880 (21 Stat. 199), which (a) the United States sold for cash between July 1, 1910, and June 28, 1938, (b) disposed of as free homesteads from December 19, 1885, to June 28, 1938, and (c) set aside for public purposes during the period from June 30, 1910, to June 27, 1938. The plaintiffs concede that due and proper accounting has been made by the defendant to the plaintiffs for those lands sold for cash during the period from June 30, 1910, to June 28, 1938. * * * [Emphasis supplied.] [*Id.* at 436-37.]

The stipulation then went on to describe a "Schedule 1," which contained the legal descriptions of approximately 1,523,236.95 acres of land embraced by the stipulation, saying: "So far as the parties with diligence have been able to determine these descriptions represent all the land so disposed of and set aside." [*Id.* at 437.] This Schedule 1 contains 338 pages of single-spaced, typewritten legal descriptions of land. A land expert would find it difficult, if not impossible, to make sense of this Schedule 1. Even if he were to analyze it, months of his time would be required in the process. When confronted with the schedule of lands pursuant to settling case No. 46640, the government only ran a spot check of the schedule, and concluded that while there were errors, it was impractical to continue the examination. Evidencing an obvious lack of reliance on the correctness and completeness of Schedule 1, the stipulation signed by both parties went on to state:

> * * * However, the judgment to be entered in this case is *res judicata, not only* as to the land described in Schedule 1, *but, whether included therein or not, also* as to *any land* formerly owned or claimed by the plaintiffs in western Colorado, *ceded to defendant by the Act of June 15, 1880* (21 Stat. 199), and by the defendant during the aforesaid periods of time sold for cash, disposed of as free homesteads and set aside for public purposes. * * * [Emphasis supplied.] [*Id.* at 437.]

One searches in vain for a more clear, a more precise, a more final disposal and release of claims, than the one just quoted.

As stated earlier, the key issue now is whether the lands presently at bar, lands from Royce Area 617 in southwestern Colorado, were included in this all-inclusive 1950 settlement. To determine this, one must analyze the history of the lands at bar, to determine whether these lands are part of the "land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880 * * *."

The majority has explained the history of this land prior to 1880. To avoid being repetitious, I will start my analysis at 1880. The agreement of 1880 which resulted in the Act of 1880 was inspired by the so-called Meeker Massacre of 1879, in which an Indian agent and others were killed by certain Utes. The government sought to pacify the nomadic Utes by domesticating them, to the extent that each Indian would be given an allotment of agricultural land, upon which he would be converted from a nomad to a farmer. The vast majority of the 1869 Ute Reservation was not suitable for agricultural purposes; therefore, other lands had to be found. So under the Act of 1880, the Uncompahgre Utes were to move to agricultural lands on the Grand River in Colorado and Utah, and there receive their allotments. The White River Utes were to move to agricultural lands on the Uintah Reservation in Utah, and there receive their allotments. There was some suitable agricultural land in southwestern Colorado along the LaPlata River, and it was to this area that the Southern Utes were to move and receive their allotments. Section 3 of the 1880 Act authorized the Secretary of the Interior to survey the lands in the vicinities mentioned, and then the Commissioners were to cause allotments to be made to each and every Indian. Then the Act states, in clear, precise, and totally unambiguous language:

> * * * [*A*]*nd all the lands not so allotted*, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, *released and conveyed* to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, * * *. [Act of June 15, 1880 (21 Stat. 199).]

Clearly (it could not be stated more clearly), the surplus of the lands after allotments were made was conveyed to the government by the 1880 Act. Therefore, the words in the 1950 case No. 46640, "ceded by plaintiffs to defendant in 1880," words which are descriptive of the lands involved in the 1950 settlement, include the lands

presently before the court, and the doctrine of *res judicata* bars any further recovery.

Another look at the purpose of the 1880 Act reaffirms this conclusion. No new reservations were created by this Act. Rather, each tribe was merely moved to a certain area of land, out of which the tribe members were to receive individual allotments. No Uncompahgre Reservation was set up in Colorado and Utah, no White River Reservation was established in Utah, and no Southern Ute Reservation was established in southern Colorado.

How do appellees, the Southern Utes, try to get around this clear language? This is a difficult question for them to answer, and several different theories have been pressed upon the court at various stages of these proceedings. In its brief, the appellees say that the converse of the plain terms of the 1880 Act is true, namely, that the land now at bar was set apart and ceded to the Indians by the 1880 Act. This is patently insupportable by the clear terms of the 1880 Act.

Th second theory was advanced when this case was first up for oral argument in 1967, and counsel for appellees made a straightforward and honest acknowledgement in open court that the lands at bar were indeed ceded to the government in 1880, but were in effect receded to the Indians by the Act of 1895. In light of this acknowledgement, the court entered an order of remand for the taking of additional evidence as to the intention of the parties to the 1950 stipulation. Apparently realizing the devastating damage that this acknowledgement did to their case, and that they could not prevail under it, appellees' counsel later said that the court "misconstrued" the acknowledgement, and sought to explain it away in its Motion to Vacate Order of Remand. The court did not misconstrue the statement. I was present and heard counsel make it. To clear the record, an examination of the 1895 Act to bring to light its true effect and purpose is in order. Unlike the Uncompahgre and White River Utes, who soon went to the land set aside for them and took allotments, the Southern Utes resisted allotments. Apparently, the life of the farmer did not appeal to them, so they continued living in a nomadic

state within the bounds of the land set aside for their allotments. In 1888 they attempted to negotiate a settlement to move to Utah, but this was not ratified. So here the Southern Utes were, living within a land area, but refusing to take allotments as directed by the Act of 1880. To verify this, we have only to look at appellees' own evidence in this case. Exhibit No. 5 before the Indian Claims Commission contained a copy of a report dated April 28, 1894, from the Commissioner of Indian Affairs to the Congress. Speaking of the Southern Utes' presence on the land set aside for allotments by the Act of 1880, the Commissioner said, "Here they have remained ever since, being in the anomalous condition of having ceded their reservation and yet remaining upon it." The Commissioner in 1894 clearly understood the stalling tactics of the Southern Utes, and saw the necessity for bringing an end to this "anomalous condition." And indeed, it was to end this condition that the Act of 1895 was passed. This Act did not change the 1880 Act; the declared purpose of the 1895 Act was that "* * * [*T*]*he treaty made with said Indians June fifteenth, eighteen hundred and eighty, be carried out as herein provided, and as further provided by general law for settling Indians in severalty.*" [Act of February 20, 1895 (28 Stat. 677).] [Emphasis supplied.] A reading of the Act of 1895 makes it manifestly apparent that no cession, no reservation was encompassed. Rather, the Indians who would take allotments were given them, and those who refused were moved to a reservation in New Mexico and western Colorado. (This is the present site of the Ute Mountain Reservation—this land is not in issue in the case now before the court.) The remainder of the land in Royce Area 617 after allotments were assigned (this is the land at bar) was opened for settlement under the homestead laws for the first time. (It should be noted that the sale of the land under the homestead laws was a violation of the Act of 1880. That is why, I believe, the 1950 settlement with the Indians included land "* * * disposed of as free homesteads from December 19, 1885, to June 28, 1938, * * *." [*Id.* at 437.]) So any argu-

ment that the land was receded to the Indians in 1895 cannot be sustained.

This leads directly to the third theory advanced by appellees regarding its retention or acquisition of the lands presently before the court. This theory, set forth in the Motion to Vacate Order of Remand and in the most current oral argument before the court, states in effect that the lands were "set-aside" in 1880, and officially recognized as Southern Ute lands in the Act of 1882. This argument, just as the prior arguments, misses the mark. The first half of this argument is true. The lands were indeed set-aside in 1880, but as we have shown, only for the purpose of taking allotments. The remainder after allotments was released and conveyed to the United States, and therefore clearly within the 1950 settlement with the Indians (Case No. 46640). The second part of the argument is a misinterpretation of the clear terms and purpose of the Act of July 28, 1882 (22 Stat. 178). By the time of this Act, the Uncompahgre and White River Utes had moved from the former Colorado Reservation to the areas set aside by the Act of 1880 for their allotments. Therefore, this vacated land area was now ready for settlement, and the Act of 1882 was passed to open this area for disposal under the terms of the Act of 1880. But the Southern Utes were still (and for thirteen more years continued) stalling, so the remainder after allotments of their set-aside land area was not ready for settlement. The government wished to keep this set-aside area intact for allotment purposes until allotments were made, so paragraph two was inserted in the Act of 1882, to provide for the surveying of a line between the lands opened, and the lands set aside for allotments. Keeping this area temporarily intact for allotments was the sole purpose and sole legal effect (before the majority opinion of this court in this case) of the Act of 1882. There is again a complete absence of any words of cession or reservation. Therefore, this theory advanced by appellees is without merit.

In fact, no theory has been advanced by the Southern Ute Indians which would enable us to uphold the opinion

of the Indian Claims Commission. Rather, the government has successfully shown that the Commission's opinion must be reversed. The 1950 settlement (117 Ct. Cl. 433, 436) is applicable, because the lands at bar were included in that case. The appellees are absolutely bound and barred by the 1950 case; the doctrine of *res judicata* cuts them off. Any other conclusion would be a violation of the Supreme Court's holding in *United States* v. *Wm. Cramp & Sons Co.*, 206 U.S. 118, 128 (1907), where the Court said:

> Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical and close construction. The general language "all and all manner of debts," etc., indicates a purpose to make an ending of every matter arising under or by virtue of the contract. If parties intend to leave some things open and unsettled their intent so to do should be made manifest. * * * [*Id.* at 128.]

The language of the 1950 stipulation is even clearer, more all inclusive, and more final than that quoted by the Supreme Court. It says that the judgment entered in that case is *res judicata*, "not only as to the land described in Schedule 1, but, * * * also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and * * * disposed of as free homesteads * * *." To tie up all the loose ends, this court in 1950 went even farther, and said "* * * The petition of plaintiffs herein shall be deemed amended to conform to this stipulation." [*Id.* at 437.] The comprehensive terms of the stipulation for judgment in case No. 46640 show an intent to clean up and close up every claim arising out of the government's dealings with the Ute Indians and their former Colorado Reservation land. There is no manifestation of an intent to reserve any claim. Appellees' present claim falls squarely within the four corners of the 1950 settlement, and has therefore already been settled, paid, and extinguished.

And, the tribe is further bound because of the concession it made in this 1950 stipulation. The stipulation,

accepted by this court and the parties to the suit, read "The plaintiffs concede that due and proper accounting has been made by the defendant to the plaintiffs for those lands sold for cash during the period from June 30, 1910, to June 28, 1938." At the time this concession was made, the GAO Report for case No. 46640 had been mailed to the attorneys for the Southern Utes. This report (Def's Ex. No. 21) included sales from the Southern Ute portion of the 1880 cession under the act of 1895. The Tribe conceded that this accounting was due and proper. (Sales from the Southern Ute portion of the 1880 Cession up to 1910 were accounted for in case No. 30360 (45 Ct. Cl. 440 (1910)).

The Indian Claims Commission dismissed this crucial factor, saying that the amounts included were merely errors on the part of all concerned. These "errors" amounted to $215,989.95 paid under section 3 of the Act of 1880, and $215,977.58 paid under section 5 of the Act of 1895. The true error here was made by the Commission in not recognizing the true nature of this former compromise and settlement of appellees' claims.

One additional point should be raised regarding the effect of case No. 46640. This court ordered the case remanded to the Indian Claims Commission in 1967 with instructions to hear additional evidence on the intention of the parties signing the stipulation. The only testimony taken at the rehearing was that of Dr. Ernest L. Wilkinson, signatory to the stipulation in case No. 46640, and of Georgette Betor Lee Hall, who took part in preparing Schedule 1. The government took the position that the stipulation spoke for itself, and that the parties' intentions should be determined from the four corners of the instrument. Further, the government produced no documents, contending that all such requested material was the work product of the attorneys for the Department of Justice, and, therefore, privileged information protected by order of the Attorney General. Not surprisingly, Dr. Wilkinson, attorney for the appellees, testified that it was not his intention to include any of the lands presently at bar in the 1950 stipulation. It is appropriate to point out that if he had said anything else, he would have made

himself ridiculous in that any other statement would have contradicted appellees' brief and his own law firm's position in this case. No weight can be given to these additional findings of fact. And a case of this magnitude cannot be decided because of a disagreement by the court with the government's policy of nondisclosure of work products. The Commission concluded that:

> * * * [I]t was not the intention of Dr. Wilkinson to include Royce Area 617 at the time he signed the stipulation in Case 46640. There is no evidence as to the intention of the attorneys who signed the stipulation on behalf of the government * * *. [21 Ind. Cl. Comm. 268, 275 (1959).]

This additional evidence is therefore factually insufficient; it is also legally insufficient. This is due to the well-settled doctrine that parol evidence cannot be admitted in collateral proceedings to vary or explain judgments or judicial records. A stipulation such as was entered in No. 46640 is an act of the court and has the same force and effect as all judgments. *Nashville, Chattanooga & St. Louis Ry.* v. *United States*, 113 U.S. 261 (1885); *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 323 (1961); *Mason* v. *United States*, 144 Ct. Cl. 579, 169 F. Supp. 507 (1959).

The reason for and importance of this doctrine was set out by this court in an earlier case, *Utah Power & Light Co.* v. *United States*, 70 Ct. Cl. 391 (1930):

> * * * If, by reason of the decree having been entered by consent, the judgment which forms part of it is not in fact an adjudication of the issues in the case in accordance with its recitals, then in all the numerous cases in which final decrees have been entered by Federal courts [on stipulation] in accordance with the agreement between counsel for the Government and counsel for the other party to the action, the decree is not binding upon the parties and becomes of no force and effect. The establishment of such a doctrine, * * *, would not only surprise the legal profession generally, but render a final

settlement of cases pending in courts practically impossible. [*Id.* at 397-98.]

The case should never have been remanded to the Commission for this purpose and I regret that I did not dissent from the decision to do so. This remand was an open invitation for a collateral attack on our 1950 judgment, which is not permissible and made it appear that our court did not know what it was doing when it entered the 1950 judgment settling, compromising, and paying all of appellees' claims of every kind and character regarding all of its lands ceded to the United States in 1880, which included the land in suit.

But, says the majority, the Indians[1] should still recover, on the theory, itself quite anomalous, that the Act of 1880 was somewhat ambiguous, and, therefore, the subsequent governmental acts and Acts of Congress can be looked to to determine ownership of the lands in question. This argument is not only a contradiction of the facts and circumstances of this case, but also violates the principle of *stare decisis*.

Primarily, the Act of 1880 is not ambiguous. Its terms clearly indicate that the title to all lands embraced by the Act, and not allotted to the individual Indians, is released and conveyed to the United States. The surplus land involved in this case, land remaining after allotments to individual Southern Utes were made, was, therefore, not the property of the Indians, but of the United States. As we have stated earlier, the language in case No. 46640, "* * * any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 * * *," is *descriptive* language. The court in 1950 had no other convenient method of describing the land, so reference was made to it in the best terms available, namely, as all land included in the Act of 1880. Since the lands at bar were not allotted to

[1] A judgment in this case will doubtless reach into the millions, as did the judgments in 1950. The current population of the Southern Ute Tribe is around 660. (Dept. of Interior, Bureau of Ind. Aff.; "Estimate of the Indian Population Served by the Bureau of Indian Affairs; 1968".)

individual Indians in accordance with the 1880 Act, title to them was therefore released and conveyed to the United States. Therefore, the lands at bar fell squarely within the stipulation in case No. 46640.

This being the case, the subsequent acts of the government are without legal effect as far as the facts of this case go. Two reasons make this conclusion mandatory. First, assuming for the sake of argument that governmental acts subsequent to 1880 were confusing, *still* the lands in question were conveyed to the United States by the Act of 1880. Second, a correct reading of the Acts of 1882 and 1895 show that these Acts made absolutely no change in the Act of 1880. I have already explained these Acts, and will not repeat myself. Suffice it to say that there are no words of cession or reservation in these later Acts (as regards the land at bar), and, therefore, title remained in the government in accordance with the Act of 1880, and did not go to the Southern Utes. The Indians' supposititious belief that they owned the land is of no legal importance, and it is surprising that the majority would believe Ute Indian Buckskin Charlie instead of the Congress of the United States. This is not a contract case where detrimental reliance comes to play; nor, for that matter, have the Indians suffered to their detriment by mistakenly believing they were the owners of the land they ceded away. And, any subsequent confusion on the behalf of changing government officials does not and cannot change the binding legal effect of the Act of 1880. Rather, it only goes to show that the Indians' stalling tactics were partially effective, and that time dulls the inattentive senses of changing governmental officials as well as of Indians.

The majority places weight on the fact that the Act of 1895 was negotiated solely with the Southern Utes. Fifteen years had then elapsed since the 1880 agreement, and the government desperately needed to get this matter settled. Therefore, it used what means it deemed expedient to convince the Southern Utes to take allotments, or move to the site of the present Ute Mountain Reservation. This meant negotiating directly with the Southern Utes, and paying the proceeds of the land held in trust

directly to them. This was a mere gratuitous windfall to the Southern Utes, and any harm done here was to other tribes of the Confederated Bands of Utes. Furthermore, even if we accept for the sake of argument the majority's position, nothing done in 1895 took the lands presently in question out of the *descriptive phrase "lands ceded in 1880."* Even if the majority's position regarding the Act of 1895 is true, the lands at bar were still within the terms of the stipulation, since they were originally part of the lands ceded in 1880, and, therefore, any claims pertaining to these lands have been disposed of and settled.

To document the fact that the lands presently before us were indeed ceded by the Indians to the government in 1880, we need only pay heed to the doctrine of *stare decisis*, and examine earlier cases decided by this court which dealt with and interpreted the Act of 1880. Each of these cases involved the Act of 1880, and what lands were embraced therein, and in each case the question of what lands were involved in the Act of 1880 was clearly before the court for decision.

The first case to arise out of the Act of 1880 is *The Ute Indians* v. *United States*, 45 Ct. Cl. 440 (1910). This was an accounting case for the proceeds of all cash sales of land ceded by the Indians to the United States under the Act of 1880, up to 1910. The printed record of the case (Def's Ex. 14a and 14b) establishes beyond a doubt that lands from Royce Area 617 (the lands presently before the court) and Royce Area 616 were included in the final judgment of this case, since these lands were within the 1880 cession to the government. In the Memorandum in re the *Confederated Bands of Indians* v. *United States*, Cause No. 30360, at page 634 (Def's Ex. 14a), the following excerpt is right to the point:

> The area of lands sold during the fiscal year 1908, as first stated, was 112,158.94 acres, while the cash received therefor is $90,219.93. (Record p. 355.) The explanation is that part of this land has been sold under the Act approved February 20, 1895 (28

> Stats., 677), [i.e., opened under the homestead laws] being surplus lands on the Southern Ute Reservation, partly on deferred payments. *These lands are embraced within the cession of 1880 and within the accounting under the jurisdictional act.* [Emphasis supplied.]

In the opinion of the court in the case, Judge Barney wrote:

> In compliance with the provisions of the act [of 1880] all of the plaintiffs were removed to Utah, and allotments were there made to them, except the southern Utes who remained upon the reservation [of 1868] and received allotments along and within its southern border and partly within New Mexico. * * *. [*Id.* at 461.]

The Judge also wrote:

> By that agreement [of 1880] the plaintiffs ceded to the United States *the entire remainder of their reservation* * * * and agreed to remove, settle upon, and accept individual allotments of unoccupied agricultural and grazing lands in *certain designated localities* * * *.
>
> It was further agreed by section 3 of said act that *all lands within the ceded limits not allotted in severalty* to the plaintiffs should be *deemed to be public lands of the United States* * * *. [Emphasis supplied.] [Id. at 459-60.]

Also included in this 1910 case was an accounting for land taken for the San Juan National Forest. This land was within Royce Area 617, the land area presently before the court, and was held by the court in 1910 to be land embraced by the cession of 1880.

Appellees have failed to distinguish this case, or to show that an error was made by the court in 1910. The majority's opinion likewise fails to follow this case, or to deal with it.

The next case involving the Act of 1880 to come up was *Confederated Band of Ute Indians* v. *United States*,

100 Ct. Cl. 413 (1943), which dealt with the remaining undisposed of lands in Royce Area 616; therefore, the Act of 1880 was again before the court. This case arose after the 1938 "restorations." (By way of explanation, in 1938 by Act of Congress, the remaining undisposed of lands in Royce Area 616 were declared to be the property of the United States, while the remaining lands in Royce Area 617 were restored to tribal ownership.)

In the Reporter's Statement of the Case, we find the following:

> By the agreement ratified, confirmed, and amended in the Act of June 15, 1880, which was in turn accepted and ratified by plaintiffs, plaintiffs *ceded to defendant all territory* in Colorado then reserved for their use, *after the allotment* of certain lands to individual members of plaintiff bands as provided by said agreement. * * * [*Id.* at 416.] [Emphasis supplied.]

This is a correct interpretation of the Act of 1880.

The Reporter also set out the terms of the restoration of Royce Area 617:

> * * *[T]he Secretary of the Interior purported to restore certain lands in the southern portion of the area ceded in the Agreement of 1880 to the "Ute Mountain Band of Ute Indians of the Southern Ute Indian Reservation in Colorado," and to the "Confederated Bands of the Ute Tribe of Indians, Colorado," respectively. [*Id.* at 419.]

The fact that the land was *restored* to Southern Utes and other tribes of the Confederated Bands is convincing evidence that the Southern Utes did not retain ownership of these lands, because you cannot restore land if it was never ceded away.

Judge Madden, writing for the majority, construed the Act of 1880:

> On March 6, 1880, an agreement was made by the chiefs and headmen of the Utes, which was later ratified by the members of the tribes, *to cede their*

> *remaining lands in Colorado to the United States*, after first providing for certain individual allotments to some members of the tribes. * * * [Emphasis supplied.] [*Id.* at 421.]

Here is another clear holding by this court that the lands presently in question were a part of the lands ceded by the Indians to the government in 1880.

In 1948, the court heard a suit to determine which lands were taken and the value thereof within the terms of the 1943 judgment. *Confederated Bands of Ute Indians* v. *United States*, 112 Ct. Cl. 123 (1948). The court accepted the 1943 construction of the Act of 1880. The Indians have failed to distinguish this case.

The next litigation involving the Act of 1880 is the 1950 case, *Confederated Bands of Ute Indians* v. *United States*, 117 Ct. Cl. 433 (1950), in which four causes (Nos. 45585, 46640, 47564, 47566) were settled. It is of course my contention that cause No. 46640 settled the claims on which the Indians are presently suing.

Soon after the 1950 case, the court heard a suit for attorneys' fees for services rendered to the Confederated Bands which resulted in the 1950 decision. *Confederated Bands of Ute Indians* v. *United States*, 120 Ct. Cl. 609 (1951). The very law firm which is now in court representing the Southern Utes in this case was bringing suit to determine the value of its services. Findings of Fact No. 25(b) from that case is another answer to the case before us, and, I would suggest, an answer to which plaintiffs now before us are specially bound. The court found:

> 25. (a) * * *
>
> (b) The original Ute reservation, established by treaty between the Indians and the United States in 1868, embraced 15,000,000 acres on the western slope of Colorado. In 1873 the Indians ceded to the United States a segment in the southern part of the reservation containing 3,000,000 acres. *In 1880 the Indians ceded to the United States the remainder of the reservation, containing 12,000,000 acres.* [Emphasis supplied.] [*Id.* at 623.]

In every single case which has come before this court involving the Act of 1880, this court has found that the Act ceded to the United States *all* of the lands in the former Ute Reservation in Colorado, excepting only the land transferred to individual Indians as allotments. The majority ignores these cases as if they were not in the books. In its zeal to compensate the living Indians for the claimed harm done their ancestors, the majority loses sight of the fact that the Indians have already been amply reimbursed for the land at bar in 1950. The Southern Utes may have sincerely believed that this land was theirs, but Indians too can be wrong. In another case in which the Utes were plaintiffs (involving different land), the Supreme Court set out the long established rule governing the interpretation of treaties, acts, and agreements between the Indians and the United States:

> * * * While it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation, create presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean. *Choctaw Nation* v. *United States*, 318 U.S. 423, 431-432. We cannot, under any acceptable rule of interpretation, hold that the Indians owned the lands merely because they thought so. Solicitous as the Government is to carry out its promises to the Indians in good faith, we are satisfied from this record that the Government has performed all that it promised. [*Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169, 179-80 (1947), *aff'g*, 106 Ct. Cl. 33, 64 F. Supp. 569 (1946).]

I am satisfied that in the case before us the government has performed all it promised and has already paid the Indians for their present claim.

It should be pointed out that when the four cases (Nos. 45585, 46640, 47564 and 47566) were settled in *Confederated Band of Ute Indians* v. *United States*, 117 Ct. Cl.

433 in 1950, the settlement was one of pure compromise of all the claims of the Ute Indians. The agreement of settlement was not reached quickly. In fact, negotiations for compromise and settlement extended over a period of three years. The government first offered the sum of $14,000,000, plus interest, less offsets, in full settlement. This was refused by the Utes. The government then offered $20,000,000, including interest, less offsets, which was refused.

The Utes' attorneys demanded $30,000,000 in settlement of all the claims and cases. Finally, the parties agreed to a compromise settlement of $20,000,000, plus interest, amounting in all to the sum of $31,938,473.43. This amounted to $15,600 for each Indian. The parties then entered into a joint stipulation and judgment of compromise and settlement of all claims and demands, right, title, interest, and estate of whatsoever nature in and to the land in western Colorado ceded by the Ute Indians to the United States by the Act of June 15, 1880. All of these negotiations are shown in the opinion of this court in the case of *Confederated Bands of Ute Indians* v. *United States*, 120 Ct. Cl. 609 (1951) in which the attorneys were asking this court to allow them an attorney fee of $3,193,847.35.[2] They alleged in great detail all the work they had done, which was considerable, how they had negotiated for the compromise and settlement and how long it took to reach a settlement agreement. The significance of all of this is to show that the settlement was a lump sum compromise in the nature of a jury verdict for *all* the claims of the Ute Indians with reference to the land ceded in 1880 (including the land involved here). It did not matter what land was listed in Schedule 1, nor whether or not all of it was listed, nor whether the listing was correct. The Indians make a great deal to do over their claim in this case that no land in Royce 617 was listed in the Schedule. This is immaterial, because the stipulation of the parties and judgment stated it was in *full* settlement and payment for the *complete extinguishment* of plaintiffs' claims of *whatso-*

[2] The sum of $2,800,000 was allowed.

ever nature in and to the lands ceded in 1880, *whether listed in Schedule 1 or not*, and plaintiffs' petition was deemed amended to conform to the stipulation.

The Indians and their attorneys are estopped to attack or impeach their own stipulation and judgment which they signed and accepted and for which they have been paid. *Davis* v. *Wakelee*, 156 U.S. 680, 689-90 (1895); *Livesay Industries, Inc.* v. *Livesay Window Co.*, 202 F. 2d 378, 382 (5th Cir. 1953), *cert. denied*, 346 U.S. 855; *American Nat'l Bank & Trust Co.* v. *Taussig*, 255 F. 2d 765, 769 (7th Cir. 1958), *cert. denied*, 358 U.S. 883. This settlement was payment for, and an accord and satisfaction and release of, all of their claims, including those before us in the instant suit. I mention the attorneys because this court must fix their attorney fees, as it did in the previous case, as an amount not exceeding 10 percent of the recovery. They shared in the previous recovery on a contingent fee basis and will share in this one on the same basis. I consider that under the circumstances they are bound by the stipulation, settlement, and judgment in 1950 to the same extent that the Indians are bound.

Lack of Necessary Parties Plaintiff

There is another fatal flaw in the Indians' side of the case before us, a flaw which requires a reversal of the decision in this case. This is because there is a lack of necessary parties before the court.

First, it should be observed that any claim that the White River, Uncompahgre or Uintah Utes might have had was lost in the following Resolution of June 1, 1950. (Def's Ex. 18. This resolution was accepted by Congress and carried into effect by section 2 of the Act of August 31, 1951, 65 Stat. 194.)

> (3) * * * [T]hat the Southern Ute Band (including the Ute Mountain Utes) shall foreover possess and own their Reservation [this included the Ute Reservation established west of Range 13 by the Act of 1895 and the residue lands (unallotted, unsold and not taken for the San Juan National Forest) east of

> range 14 which were restored to tribal ownership by order of the Secretary of the Interior of September 14, 1938] free from any claim of the Ute Indian Tribe of the Uintah and Ouray Reservation * * *.
>
> (4) * * * [T]hat neither the Southern Utes (including the Ute Mountain Utes) nor the Uncompahgre, White River or Uintah Utes shall have any claim against each other for the past distribution of funds or allocations of land; * * *.

The fatal lack of parties, however, involves the various original signatories to the Agreement of 1895. The Southern Utes before the court cannot recover, because the present day Ute Mountain Utes, who are a part of the Southern Ute Tribe, are not parties to the suit.

At the time of the passage of the Act of 1895, there were three bands known collectively as the Southern Utes; the Muaches (or Moaches), the Capotes and the Weeminuches. As I have said above, by the Act of 1895, one group of Indians chose to move to a reservation in western Colorado and New Mexico, and the other Indians chose to take individual allotments in the eastern portion of Royce Area 617. The group refusing allotments, which moved to the new western reservation, was composed mainly of Weeminuches (see appellees' brief at 13-14), and became known as the Ute Mountain Tribe, and were officially so recognized in 1940. The individual Indians who took allotments in the east were mainly Capotes and Muaches and are the appellees now before the court.

The Act of 1880 moved the Capotes, the Muaches and the Weeminuches (under the collective name of the Southern Utes) to the land area now in question for the purpose of taking allotments. Then, in 1895, some moved to the site of the present Ute Mountain Reservation in the west and some took allotments in the east. (It should be noted that the appellee Southern Ute Tribe had no official reservation until 1938, when the residue of unsold and unallotted lands in Royce Area 617 was restored to tribal ownership by order of the Secretary of the Interior. Prior to 1938, the only possessory interest any of these Southern Utes held in any land was their individual interest in their individual allotments.)

Under section 5 of the Act of 1895, all of the bands of the Southern Utes, including the present day Ute Mountain tribe and the appellees, shared in the special benefits from the lands to be sold after the allotments. (See 28 Stat. 677, 678.) The Act even specifically set aside, out of the first moneys realized, an amount to be paid to "Buckskin Charlie, as chief of the Moaches, and *Mariano, as chief of the Weeminuches*, [who was of the Ute Mountain tribe] * * * [and] to Tapucke and Tabewatch, as chiefs of the Capotes * * *."

It is perfectly clear that the only property granted appellees' ancestors were the allotments, and the only property granted the ancestors of the present Ute Mountain Tribe was the land which is now the Ute Mountain Reservation. And the right to the proceeds from the remaining lands sold (the basis of this case) was granted to *all* of the Southern Utes (ancestors of the present Southern Ute Tribe and Ute Mountain Tribe) by the Act of 1895. Therefore, the Ute Mountain Tribe, not a party to this suit, has an interest in every claim arising from this land. Appellees' failure to join them results in a fatal lack of necessary parties.

In their brief, appellees attempt to deal with this serious problem within the space of three paragraphs (see brief at 13-14). To put it mildly, the reasoning and statements set forth are pure fantasy. Appellees say that the Act of 1895 was, "In effect, * * * a cross-relinquishment of rights between the allotted and unallotted Southern Utes * * *." This is simply wishful thinking, and is plainly contradicted by the specific terms of the Act of 1895, which gives the benefits and proceeds from the Act to *all* Southern Utes, both allotted and unallotted. There is neither in effect, nor in fact, nor in law any such "cross-relinquishment" of rights. The brief then says that "the unallotted Southern Utes surrendered their interest in the eastern portion of 'their present reservation' and the allotted Southern Utes surrendered their interest in the western portion." This again is simply fantasy. The Act of 1895 reserves the rights of *all* Southern Utes (Weeminuches, Capotes and Muaches, or, present day Ute Mountain Tribe and Southern Ute Tribe) to the proceeds of the sale of remaining lands.

Appellees then say, "The Southern Utes accepted this separation and two land-owning groups, each with its own reservation, were created. Through the voluntary cross-relinquishment of their interests under appropriate legislation, the allotted Southern Utes became the sole owners of the eastern part of the Southern Ute Reservation." (Brief at 14.) First, two land-owning groups, each with its own reservation, were *not* created. The only interest the allotted Indians held in the land was in each individual allotment. No reservation in the eastern part of Royce Area 617 was created; to the contrary, only individual allotments were created. Second, neither through a hypothetical "cross-relinquishment," nor through "appropriate legislation" (it is interesting to note that we are not cited to any of this "appropriate legislation"), did the present day Southern Utes become sole owners of the eastern part of Royce Area 617. To the exact contrary, the present day Southern Utes became owners only of individual allotments, and the remaining land was held by the government, with the proceeds to go to all of the Indians, Weeminuches, Capotes and Muaches, regardless of whether they lived on the new Ute Mountain Reservation, or on an allotment.

I do not agree with the hindsight approach of the majority to this problem by its reliance on and interpretation of Rule 62(a) of this court. This rule applies only to suits originally filed in this court. The case before us is not such a case, but is one that was filed originally with the Indian Claims Commission, which has its own rules, and we are hearing the case on appeal. Not only that, but this court has its own separate rules for Indian cases it hears on appeal, adopted in 1948, entitled "Rules of the Court of Claims of the United States Governing Appeals From the Indian Claims Commission." Consequently, Rule 62(a) does not apply. In any event, the interpretation of this rule by the majority renders it meaningless. They say, in effect, that the rule means that an outside third party who may not even know the suit is pending, must affirmatively and timely intervene (file a claim) and, if he does not do so, the rule is satis-

fied. This is not what the rule says. It states in unequivocal language:

> * * * [P]ersons having a joint interest adverse to the United States, *shall be made parties* and *shall be joined* on the same side as plaintiffs. When any person who should join as a plaintiff refuses to do so, he may be made an involuntary plaintiff. [Emphasis supplied.]

As may be seen, this rule provides that persons having an interest "shall" be made parties and "shall" be joined as plaintiffs. This is compulsory and not optional. Also, the rule, where it is applicable, contemplates that persons having an interest *at the time the suit is filed* shall be joined. This suit was filed August 10, 1951, at a time when the Ute Mountain Indians of the Southern Ute Tribe unquestionably had an interest in the claim. Under Rule 62(a), if it applies, they should have been made parties by the appellees at that time, and because of the failure to do so by appellees, there was and is a fatal lack of necessary parties in this case. But, the majority, with its hindsight approach is applying the rule as of now, 18 years after the suit was filed, saying, in effect, it would do no good to make them parties now because limitations has run on their claim, and, therefore, Rule 62(a) is satisfied and the present plaintiffs, notwithstanding their failure to comply with the rule, is in the position of "winner take all," including the interest of the Ute Mountain Indians. I cannot agree with this interpretation of the rule.

But, the problem does not end here. The Commission itself said that if the Utes ceded their entire Colorado Reservation in 1880, "then the present day Ute Mountain Utes as well as the remainder of the Confederated Utes would have been necessary parties."[3] Of course, as shown by the foregoing, this is exactly what happened. The Utes did cede all their remaining reservation to the United States in 1880. Therefore, the Ute Mountain Utes were necessary parties.

There is another reason not mentioned by the government why the Ute Mountain Utes are necessary parties

[3] 17 Ind. Cl. Comm. 28, 52.

to this suit. I refer to the fact that this suit was filed by the Southern Ute Tribe or Band of Indians. There is no question but what the Ute Mountain Utes, who live in the west, are as much a part of the Southern Ute Tribe or Band of Indians as the other Indians who live in the east (of Royce 617). I see nothing to prevent the Ute Mountain Utes from suing the United States, after payment of the judgment being awarded to the present appellees by the Commission and by the majority in this case, on the theory that since they are a part of the Southern Ute Tribe or Band of Indians, this suit was maintained for their benefit and the government has paid their part of the recovery to the wrong parties, namely, the Southern Utes who live in the eastern part of Royce 617. In that case, the government would have the obligation of paying the claims for this land not only twice, but *three* times. The situtaion finally gets ridiculous. This problem is not cured by the allegations and contentions of the present plaintiffs to the effect that they are the sole owners of the claim, because the Ute Mountain Indians of the Southern Ute Tribe have had no notice of this suit and could not be bound by allegations of the plaintiffs unknown to them. They could, with sound reason, dispute this claim of the present plaintiffs and would no doubt do so if they had notice of this suit and were parties to it.

As late as 1951, the Congress considered the Ute Mountain Utes to be a part of the Southern Ute Band as shown by the resolution carried into effect by section (3) of the Act of August 31, 1951, 65 Stat. 194, quoted above, which contained the provisions "(3) * * * [T]he Southern Ute Band *(including the Ute Mountain Utes)*" and again in section (4): "* * * [T]he Southern Utes *(including the Ute Mountain Utes)*." [Emphasis supplied.] There is no question but what the Ute Mountain Utes were as much a part of the Southern Ute Tribe as were the present appellee Indians, and they were necessary parties to this lawsuit. It is difficult to see how one could reach a different conclusion.

The appellees have completely failed to sustain their contention that they are the sole owners of the claims in

suit. Perhaps it is natural that they have failed in this respect, because it would have been impossible for them to prove otherwise, since in reality they are not the sole owners of the claims in suit.

The claim stated in the appellees' petition, filed August 10, 1951 (before the expiration of the Indian Claims Commission Act), sought an accounting for:

> c. Defendant's failure to account for the proceeds from approximately 81,953.18 acres * * * was in violation of the aforesaid statutes [of 1880 and 1895] * * * and caused damage to petitioner in an amount equal to that received by defendant, which amount is unknown to petitioner, but is known to defendant.
> d. Defendant's failure to account for the proceeds from the sale of approximately 81,953.18 acres constituted unfair and dishonorable conduct on the part of defendant, and caused damage to petitioner in an amount equal to that received by defendant * * *.

As this is no more than a claim for proceds from sales, this claim has already been settled by the stipulation case No. 46640 (117 Ct. Cl. 433, 436 (1950)).

The additional accounting claims, which deal principally with mismanagement of trust funds (see Def's brief at 81-86 for complete listing), were inserted in the case in 1963 by way of filing exceptions. This was long after the 1951 expiration date of the Indian Claims Commission Act (25 U.S.C. § 70k). When the tribe presented these additional claims, defendant objected strenuously that the claims were beyond the scope of the initial claim, and, therefore, their admission was violative of the Supreme Court's ruling in *United States* v. *Seminole Nation*, 299 U.S. 417 (1937), wherein the court said that after the time allowed in a jurisdictional act has run out, amendments may only supply details, but may not bring in additional claims. (This holding followed in *Seminole Nation* v. *United States*, 316 U.S. 286, 288-89 (1942).) The claims filed in this suit in 1963 are obviously beyond the scope of the original claim filed in 1951.

The Commission seems to concede that the new claims asserted went beyond the original claim, when it said:

> Defendant's objection goes specifically to the fact that petitioner has requested an accounting in its petition for certain specific items and has now raised by means of the exceptions * * * certain general accounting claims not referred to in its petition. [17 Ind. Cl. Comm. 28 (1966).]

But the Commission attempts to get around this by applying a rule sounding in equity, that the tribe did not know how its funds had been mishandled within the time allowed, and that this knowledge came to light only after the appellees received the GAO report in the case. Even if this statement was factually correct, it could not extend the jurisdiction of the Commission, for the enabling Act reads:

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress. [25 U.S.C. § 70k (1964).]

But further, the evidence in this case shows that GAO reports covering the handling of the funds had been submitted to the Utes' counsel as early as June 1949 (report in case No. 46640), and February 1953. Although the latter GAO report, the report in this case, was submitted in 1953, it was not until 1963 that counsel for the Southern Utes filed these exceptions. Not only was the late filing barred by limitations due to the Indian Claims Commission Act quoted above, it was also barred by the equitable doctrine of laches.

Conclusion

In my opinion, in accordance with section 20 of the Act creating the Indian Claims Commission (25 U.S.C. § 70s(b) (1964)), I would hold that the findings of fact of the Indian Claims Commission in this case are not supported by substantial evidence, and especially its findings that the Confederated Bands of Ute Indians did not

cede their remaining lands in their Reservation to the United States in 1880; that the Ute Mountain Utes in the west of Royce 617 are separate from the Southern Ute Tribe in the east; that the lands involved in this case were not included in the settlement of 1950 and that the parties did not so intend; that a proper accounting has not been made by the government to the appellees. I would also hold that the conclusions of law stated by the Commission as a basis for its final determination are not valid and are not supported by its findings of fact for all of the reasons stated herein. This is particularly true with reference to its conclusions of law that the Ute Indians did not cede all their remaining lands to the United States by the Act of 1880; that the subsequent Acts of 1882, 1888, and 1895 restored and vested the lands involved here in the Southern Utes in the eastern part of Royce 617 and to the exclusion of the Ute Mountain Utes; that said lands were not included in the 1950 settlement and the appellee is now entitled to be paid for it; that *res judicata* does not apply and that the Ute Mountain Utes are not a part of the Southern Ute Tribe and consequently have no claim and are not necessary parties.

Both the majority and the Commission ignored and ruled contrary to the following well-established principles of law in allowing the plaintiff Indians to recover in this case:

1. *Res judicata.*
2. *Stare decisis.*
3. Compromise and settlement.
4. Payment.
5. Accord and satisfaction.
6. Release of all claims.
7. Collateral attack on the 1950 judgment.
8. Disregarding the 1950 judgment of this court when no direct attack has been made on it.
9. Estoppel of the Indians to impeach their own act in executing the stipulation, settlement, and judgment of 1950.

10. Varying the terms of the written stipulation and judgment of 1950 by the parol evidence of Attorney Wilkinson 19 years later as to his intention.
11. Lack of necessary parties plaintiff.
12. Limitations and lack of jurisdiction as to the accounting claim.
13. Lack of substantial evidence.
14. Erroneous conclusions of law.

Seldom do you find a case where so many bulwark principles of law have been ignored, by-passed, and violated. In my opinion, the decision should not stand.

I would reverse the decision of the Commission and enter judgment for the defendant.

COWEN, *Chief Judge*, dissenting:

Although I cannot join in a number of the observations made in his dissenting opinion, I am persuaded that Judge Skelton has accurately analyzed the purpose and effect of the Act of 1880 and subsequent acts involved in this appeal and has correctly concluded that appellee's right to recover is precluded by the judgments entered by this court in 1950 in the four cases (Nos. 45585, 46640, 47564, and 47566), *Confederated Bands of Ute Indians* v. *United States*, 117 Ct. Cl. 433 (1950).

I also agree with Judge Skelton that this court erred in remanding the case to the Indian Claims Commission to determine the intention of the parties in executing the stipulation on which the judgment in Case No. 46640 was based. If such a collateral attack on the judgment entered in that case were permissible, I would readily concur with the court's holding that the proceedings before and the additional findings made by the Indian Claims Commission on remand, support the conclusion that the parties never intended that the stipulation included Royce Area 617. However, as clearly established by the authorities cited by Judge Skelton, the stipulation was the basis for the entry of a final judgment which may not be re-opened or examined in such a collateral

proceeding to ascertain the intent of the stipulating parties. Although our error—an error in which I participated—in remanding the case for that purpose is regrettable, it is not too late to acknowledge the error and to correct it.

I think it is much too late in the history of the Ute Indian litigation in this court to raise any doubt about the fact that the land, which is the subject of this appeal, was ceded to the United States by the Act of 1880. This court so found in each of its decisions discussed in Judge Skelton's opinion and the Supreme Court so construed the Act in *Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169 (1947), wherein the Court stated:

> There is not one word in that Act showing a congressional purpose to convey the Executive Order lands, or any other lands, to the Indians. On the contrary, the Act embodied a transaction whereby the Indians were the transferors and conveyed lands to the Government. For the value of lands so conveyed, and for no other, the Government was to make an account to the Indians after certain deductions had been made. [330 U.S. at p. 177].

Moreover, the plaintiffs in the four suits (Nos. 45585, 46640, 47564, and 47566), filed pursuant to the Jurisdictional Act of June 28, 1938, 52 Stat. 1209, alleged that the land had been ceded to the United States. For example, paragraph 5 of plaintiff's petition in Case No. 46640 reads as follows:

> By agreement of March 6, 1880, which was amended, ratified and confirmed by Act of Congress of June 15, 1880, c. 223, 21 Stat. 199, 1 Kappler 180 (amended by Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205), plaintiffs ceded to defendant a vast area of land in exchange for which defendant among other considerations agreed, after the allotment of certain lands to individual members of plaintiffs, to hold the balance of such lands in trust for cash entry (and not entry or settlement under the homestead laws), and to deposit the proceeds re-

ceived from such sales, after certain stipulated payments, in the Treasury of the United States for the benefit of plaintiffs. The Agreement of March 6, 1880, as amended by the aforesaid Act of June 15, 1880, was ratified and approved by three-fourths of the adult male Indians of the Confederated Bands of Utes within the time limit fixed by Section 10 of said Act.[1]

Furthermore, it is not open to question that the Jurisdictional Act of June 28, 1938, pursuant to which the four suits settled in 1950 were filed, was intended to confer jurisdiction on this court to hear, determine and render judgment on all remaining claims, legal and equitable, which the Indians then had against the United States, whether the claims arose under the Act of 1880 or subsequent acts. The first section of the Act provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred on the United States Court of Claims to hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians or any tribe or band or any constitutent [sic] band thereof, may have against the United States, including, but without limiting the generality of the foregoing, claims arising under or growing out of any treaty or agreement of the United States, law of Congress, Executive order, or by reason of any lands taken from them, without compensation, or for the failure or refusal of the United States to protect the interest of any of said bands in lands (as to which any of said bands had the possessory right of use and occupancy), or because of any mismanagement or wrongful handling of any of the funds, land, property, or business enterprises belonging to or held in trust for any of said bands by the United States, or any misfeasance or nonfeasance on the

[1] *See* Vol. 960, Printed records, Court of Claims Term 1949.

part of the United States with respect thereto, or otherwise.

I find nothing in the foregoing or elsewhere in the Act which suggests that the claim involved in this appeal was somehow reserved or excluded from the terms of the statute.

The Indian Claims Commission found that appellee is entitled to recover for the taking of 230,547.44 acres of land disposed of by defendant as free homesteads between 1899 and September 14, 1938, for interest due on the proceeds of the sales of appellee's land, and for an accounting as to the use of such proceeds.[2]

Plaintiff's petition in Case No. 45585 (the first of the four suits brought pursuant to the Act of June 28, 1938, and settled in 1950) was filed November 22, 1941, and plaintiff's petition in No. 46640 was filed October 15, 1945. Prior to the time these suits were filed in the Court of Claims, the causes of action, upon which the Commission predicated defendant's liability to the appellee, had accrued and could have been included in the four suits. Moreover, the allegations of plaintiff's petition in Case No. 46640 were broad enough to include the claims for which the Commission held the defendant liable. In the amended petition filed in that case on March 19, 1947, plaintiffs alleged the following in paragraphs 6 and 7.[3]

> 6. By decree of this Court in a suit brought by plaintiffs in 1909 (The Ute Indians v. The United States, No. 30360), pursuant to a jurisdictional act of March 3, 1909, c. 263, 35 Stat. 781, 788, plaintiffs recovered judgment against defendant for the proceeds of certain sales and other disposals of the aforesaid lands up to June 30, 1910. No relief is sought with respect to such sales and dispositions in this action, but relief is sought with respect thereto in Case No. 47566, filed in this Court on December 30, 1946.

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[2] 17 Ind. Cl. Comm. 28, findings 10, 11, 19 and 20.

[3] Plaintiff's amended petition in No. 46640, *The Confederated Bands of Ute Indians* v. *United States*, Printed Records Court of Claims Term 1949.

By Executive Orders of December 6, 1916 and September 27, 1924, defendant withdrew and set aside 64,560 other acres of the aforesaid lands as naval oil reserves which lands are the subject matter of Case No. 47564, filed in this Court on December 30, 1946, and no relief is sought therefor in this action.

By Agreement of May 10, 1911, amended, ratified and confirmed by Act of June 30, 1913 (38 Stat. 77, 81-82), defendant conveyed 20,160 other acres of land subject to the aforesaid 1880 Agreement, together with other lands to the Weeminuche or Southern Ute Indians in partial exchange for lands from the then reservation of said Indians. Such lands are the subject of plaintiffs' claim in Case No. 47565, filed in this Court on December 30, 1946, and no relief is sought therefor in this action.

Since June 30, 1910, and prior to June 28, 1938, defendant made other and further sales and disposals of certain of said lands, by sales thereof for cash, by homestead or other entries under the public land laws for less than the agreed minimum price per acre, by setting apart and reserving such lands as national reservations or for other public uses, or by otherwise classifying, reserving, or withdrawing such lands from entry and sale under the public land laws. Plaintiff is advised, believes, and therefore avers that defendant has not accounted to plaintiffs for such cash sales or paid plaintiffs the minimum per acre price for lands entered under the homestead laws in accordance with the Act of July 28, 1882 (22 Stat. 178) or otherwise, nor paid plaintiffs the value of such lands set apart and reserved as national reservations or classified, reserved, or withdrawn from entry and sale under the public land laws. Defendant has never rendered to plaintiffs a true, complete and proper account with respect to said property of plaintiffs and said trust funds.

7. Wherefore plaintiffs pray that defendant make a full and true discovery and disclosure of acreage

> sold, homesteaded, or otherwise withdrawn for national reservations or for other public uses, or otherwise classified, reserved, or withdrawn from entry or sale under the Public Land Laws prior to June 28, 1938, and not heretofore paid for by defendant in connection with the suit by plaintiffs brought in 1909 as hereinabove paragraph 6 recited and not the subject of the actions pending in this Court which are referred to in paragraph 6 hereof; and that defendant be adjudged liable to plaintiffs for such sales and appropriations of lands in such amount as upon a complete and accurate accounting this court may find due and owing to the plaintiffs as reasonable and just compensation, but in no event less than the minimum price at which defendant has agreed to sell such lands.

All the judges of the court are agreed that the land now in issue was, in the language of the judgment entered in Case No. 46640, "land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and by the defendant during the aforesaid periods of time * * * disposed of as free homesteads * * *." The preceding language of the stipulation—"the judgment to be entered in this case is *res judicata*, not only as to the land described in Schedule 1, but whether included therein or not"—is certainly sufficient to cover the land now in issue. Therefore, I see no way to avoid the conclusion that the final judgment entered in that case bars appellee's right to recover. The fact that the plaintiffs or their counsel had an undisclosed or unexpressed intention to exclude the land in controversy from the stipulation does not alter the conclusive effect of the judgment entered. *United States* v. *William Cramp Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907); *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 323 (1961); *Utah Power & Light Co.* v. *United States*, 70 Ct. Cl. 391, 42 F. 2d 304 (1930).

COURT OF CLAIMS

Ct. Cls. No. App. 7-66
Supreme Ct. No. 515

O. T. 1970.

THE UNITED STATES

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS

I, Frank T. Peartree, Clerk, United States Court of Claims, certify that the items contained herein constitute the complete record of original papers as filed in this court in the above cause. These papers, for transmittal to the Supreme Court of the United States under that court's Rule 25(1), are as follows:

The Record on Appeal from the Indian Claims Commission (Dkt. No. 328), and a supplement thereto. (These records are contained in two bound and indexed volumes, together with three accordian type folders and one large Manila envelope).
Appellant's Brief to the Court of Claims.
Appellee's Brief.
Appellant's Reply Brief.
Court order remanding case to Indian Claims Commission.
Appellant's motion for rehearing.
Appellee's motion to vacate order of remand.
Appellant's response to motion to vacate.
Court order denying Appellant's motion for rehearing and Appellee's motion to vacate, etc.
Additional Findings of fact of Indian Claims Commission, together with Supplemental Record on Appeal (contained in one accordian type folder).
Opinion of the Court by Nichols, J. Dissenting opinions by Skelton, J. and Cowen, Ch. J.

[SEAL]

IN TESTIMONY WHEREOF I HAVE hereunto set my hand and affixed the seal of the Court of Claims at Washington City this 25th day of November, A. D., 1970.

Clerk, United States Court of Claims.

EXCERPTS FROM PETITIONER'S EXHIBIT No. 24

GENERAL ACCOUNTING OFFICE REPORT RE: PETITION OF THE SOUTHERN UTE TRIBE OR BAND OF INDIANS INDIAN CLAIMS COMMISSION NO. 328

INTRODUCTORY

The following report was prepared in response to a letter from the Attorney General dated March 11, 1952, in which it was requested that a report be prepared for use before the Indian Claims Commission in connection with petition numbered 328 of the Southern Ute Tribe or Band of Indians, filed before the Commission on August 10, 1951, under authority of the act of August 13, 1946, 60 Stat. 1049.

Petitioner alleges that pursuant to the act of June 15, 1880, 21 Stat. 199, the Confederated Bands of Ute Indians, which included petitioner, ceded to the United States all of their lands in Colorado, except for certain lands on the La Plata River, on which the petitioner agreed to remove and settle, and which was to constitute its reservation.

Petitioner further alleges that the act of February 20, 1895, 28 Stat. 676 [677], set aside and defined the boundaries of the reservation promised by the 1880 act, consisting of approximately 1,075,000 acres; that under the provisions of the 1895 act lands within the Southern Ute Reservation could be disposed of under the desert, homestead, and townsite laws, and under the coal, mineral, stone, and timber laws, except that homestead settlers were to pay not less than $1.25 per acre; and that this act also provided that after payment of certain moneys to the Indians as set out therein, and deducting the expenses of the survey and sale of said lands, the

proceeds were to be held in trust by the United States for the sole benefit of the Southern Ute Indians.

It is also alleged that in accordance with the provisions of the 1895 act, the Presidential Proclamation of April 13, 1899, 31 Stat. 1947, opened approximately 523,079 acres of said reservation to settlement and disposal under the public land laws, and set aside approximately 157,641 acres for allotments to the Indians. Of said 523,079 acres, petitioner alleges that the United States disposed of approximately 220,495.17 acres without compensation being received therefor.

Petitioner further alleges that the United States disposed of approximately 81,953.18 acres for compensation but has made no accounting of the proceeds thereof to petitioner.

Petitioner prays for a judgment in an amount which will provide fair and just compensation for the approximately 220,495.17 acres disposed of by the United States without the payment of compensation, and for a complete and proper accounting of the proceeds of the approximately 81,953.18 acres of land for which the United States received compensation, less any proper credits or set-offs, and for such other relief as the Commission may deem fair and equitable.

There is set out on pages 4 to 36 an accounting of the proceeds derived from the sale of lands pursuant to the act of February 20, 1895, *supra*, during the period February 20, 1895, to June 30, 1951, together with an accounting of the interest on said proceeds during the period February 12, 1929, to June 30, 1951. Such an accounting covering the period February 20, 1895, to December 31, 1946, was included in the reports of this Office transmitted to the Attorney General June 24, 1949, and March 12, 1951, relative to petitions 46640 and 47567, respectively, of the Confederated Bands of Ute Indians, both before the Court of Claims.

Disbursements made for the benefit of petitioner jointly with other Indians under the jurisdiction of the Consolidated Ute Agency, Colorado, under other than treaty appropriations, during the period July 1, 1948, to June

30, 1951, are set forth in section D of the report of this Office transmitted to the Attorney General January 29, 1953, relative to petition numbered 327 of the Confederated Bands of Ute Indians before the Indian Claims Commission.

DISBURSEMENTS MADE BY THE UNITED STATES PURSUANT TO THE ACTS OF FEBRUARY 20, 1895, FEBRUARY 12, 1929, AND JUNE 13, 1930

The agreement of March 6, 1880, as ratified and amended by the act of June 15, 1880, 21 Stat. 199, provided for the settlement of the Southern Utes on agricultural lands on the La Plata River or in its vicinity in Colorado, such lands being a part of the Ute Reservation in Colorado prior to that time, and further provided that if there were not sufficient agricultural lands in Colorado, then the Southern Utes were to be located on or in the vicinity of the La Plata River in New Mexico. Pursuant to said act there was established the Southern Ute Reservation.

The act of February 20, 1895, 28 Stat. 677, provided:

> "That the agreement made by J. Montgomery Smith, Thomas S. Childs, and R. B. Weaver, commissioners on the part of the United States, with the Southern Ute Indians of Colorado, bearing date November thirteenth, eighteen hundred and eighty-eight, be, and the same is hereby, annulled, and the treaty made with said Indians June fifteenth, eighteen hundred and eighty, be carried out as herein provided, and as further provided by general law for settling Indians in severalty.
>
> "Sec. 2. That within six months after the passage of this Act the Secretary of the Interior shall cause allotment of land, in severalty, to be made to such of the Southern Ute Indians in Colorado as may elect and be considered by him qualified to take the same out of the agricultural lands embraced in their present reservation in Colorado, such allotments to be made in accordance with the provisions of the Act of Congress approved June fifteenth, eighteen

hundred and eighty, entitled 'An Act to accept and ratify the agreement submitted by the confederated bands of Ute Indians in Colorado for the sale of their reservation in said State, and for other purposes, and to make the necessary appropriations for carrying out the same,' and the amendments thereto, as far as applicable hereto, and the treaties heretofore made with said Indians: *Provided*, That Indians taking allotments as herein provided shall retain their interest in all tribal property.

"Sec. 3. That for the sole and exclusive use and occupancy of such of said Indians as may not elect or be deemed qualified to take allotments of land in severalty, as provided in the preceding section, there shall be, and is hereby, set apart and reserved all that portion of their present reservation lying west of the range line between ranges thirteen and fourteen west of the New Mexico principal meridian, and also all of townships thirty-one and thirty-two of ranges fourteen, fifteen, and sixteen west of the New Mexico principal meridian and lying in the Territory of New Mexico, subject, however, to the right of the Government to erect and maintain agency buildings thereon and to grant rights of way through the same for railroads, irrigation ditches, highways, and other necessary purposes; and the Government shall maintain an agency at some suitable place on said lands so reserved.

"Sec. 4. That at the expiration of six months from the passage of this Act the President of the United States shall issue his proclamation declaring the lands embraced within the present reservation of said Indians except such portions as may have been allotted or reserved under the provisions of the preceding sections of this Act, open to occupancy and settlement, and thereupon said lands shall be and become a part of the public domain of the United States, and shall be subject to entry under the desert, homestead, and town-site laws and the laws governing the disposal of coal, mineral, stone, and timber lands; but no homestead settler shall receive a

title to any portion of such lands at less than one dollar and twenty-five cents per acre, and shall be required to make a cash payment of fifty cents per acre at the time filing is made upon any of said lands: *Provided*, That before said lands shall be open to public settlement the Secretary of the Interior shall cause the improvements belonging to the Indians on the lands now occupied by them to be appraised and sold at public sale to the highest bidder, except improvements on lands allotted to the Indians in accordance with the provisions of this Act. No sale of such improvements shall be made for less than the appraised value, and the several purchasers of said improvements shall, for thirty days after the issuance of the President's proclamation, have the preference right of entry of the lands upon which the improvements purchased by him are situated: *Provided further*, That the said purchase shall not exceed one hundred and sixty acres: *And provided further*, That the proceeds of the sale of such improvements shall be paid to the Indians owning the same.

"Sec. 5. That out of the moneys first realized from the sale of said lands so opened up to public settlement there shall be paid to said Indians the sum of fifty thousand dollars, as follows: Five thousand dollars annually for ten years, and, when paid, the money to be equally divided among all of said Indians per capita, irrespective of age or sex; also the sum of twenty thousand dollars of said proceeds shall be paid to the Secretary of the Interior, who shall invest the same in sheep and divide the said sheep among the said Indians per capita equally, irrespective of age or sex; also to Ignacio, head chief; to Buckskin Charlie, as chief of the Moaches, and Mariano, as chief of the Weeminuches, the sum of five hundred dollars each; also to Tapucke and Tabewatch, as chiefs of the Capotes, the sum of two hundred and fifty dollars each; that the balance of the money realized from the sale of lands, after deducting expenses of sale and survey, shall be held in

the Treasury of the United States in trust for the sole use and benefit of said Southern Ute Indians. That nothing herein provided shall in any manner be construed to change or interfere with the rights of said Indians under any other existing treaty regarding any annuities or trust funds or the interest thereon.

"Sec. 6. That the foregoing provisions of this Act shall take effect only upon the acceptance thereof and consent thereto by a majority of all the male adult Indians now located or residing upon the reservation, which acceptance shall be at once obtained under such regulations as the Secretary of the Interior may prescribe."

By Presidental proclamation of April 13, 1899, 31 Stat. 1947, part of the Southern Ute Reservation was opened for settlement and entry under the terms of and subject to all the conditions, limitations, reservations and restrictions contained in the aforesaid act.

The records disclose that during the period April 13, 1899, to June 30, 1951, an aggregate of $215,985.32, being the proceeds from the sale, etc., of said lands, was received from the following sources:

Cash sales		$180.00
Sale of coal land		16,808.00
Desert land entries		74,150.97
Sale of excess acreage		190.16
Homestead entries		27,204.35
Homestead application fees		375.09
Sale of isolated tracts		3,421.54
Preemptions		568.68
Public sales		175.98
Soldiers' additional homestead entries		526.61
Sale of timber and stone land		88,043.76
Unclassified receipts	(a)	4,340.18
		$215,985.32

(a) It was not possible to determine the source of these receipts for the reason that certain of the records are missing from the files of the General Accounting Office.

Of said $215,985.32, the sum of $7.74 was erroneously credited to the Confederated Bands of Ute Indians under the act of June 15, 1880, 21 Stat. 199, and the balance of $215,977.58 was set up on the books of the United States Treasury under the heading "Proceeds of Southern Ute Reservation" (see page 12, item (a)). Said sum was augmented by $9,064.63 received from miscellaneous sources (see page 12, item (b)), making an aggregate of $225,042.21 available for disbursement. Of the sum so available, $223,222.93 was disbursed (see page 12, item (c)), $193.25 was transferred to "Confederated Bands of Utes 4% Fund" (see page 12, item (d)), $1,617.03 was returned to purchasers of land, and the balance of $9.00 was standing to the credit of the Southern Ute Tribe or Band on the books of the Treasury as of June 30, 1951.

The act of February 12, 1929, 45 Stat. 1164, as amended by the act of June 13, 1930, 46 Stat. 584, provided that funds in excess of $500 held in trust by the United States in principal accounts on the books of the Treasury to the credit of an Indian Tribe, upon which interest was not otherwise authorized by law, should bear simple interest at the rate of four percent per annum.

Pursuant to said acts, the sum of $89,344.16 (see page 16, item (a)), was set up on the books of the Treasury under the heading "Interest on Proceeds of Southern Ute Reservation" (also carried as "Interest and Accruals on Interest, Proceeds of Southern Ute Reservation"), during the period February 12, 1929, to June 30, 1951. Of the sum so available, $87,596.17 was disbursed (see page 16, item (b)), $800 was transferred to "Interest on Ute 5% Fund, Southern Ute" (see page 16, item (c)), and $947.99 was in the hands of Paul D. Banning, Chief Disbursing Officer, as of June 30, 1951.

STATEMENT NO. 1

Disbursements made by the United States for the Southern Ute Band of the Confederated Bands of Ute Indians pursuant to the acts of February 20, 1895, 28

Stat. 677; February 12, 1929, 45 Stat. 1164; and June 13, 1930, 46 Stat. 584.

* * * *

[Total] (a) $310,819.10

* * * *

STATEMENT NO. 2

Statement disclosing the disposition of moneys available pursuant to the act of February 20, 1895, 28 Stat. 677, from:

"Proceeds of Southern Ute Reservation"

	Dr.	Cr.
Proceeds, sale of land	(a) $215,977.58	
Miscellaneous receipts	(b) 9,064.63	
Disbursements made for the Southern Ute Band of the Confederated Bands of Ute Indians as set out in Disbursement Schedule No. 1, pages 19 to 27		(c) $223,222.93
Transferred to: "Confederated Bands of Utes 4%		(d) 198.25
Repayment of purchase money		1,617.08
Balance standing to the credit of the Southern Ute Tribe or Band on the books of the Treasury as of June 30, 1951		9.00
	$225,042.21	$225,042.21

* * * *

[Footnotes (a)-(d) omitted]

STATEMENT NO. 3

Statement disclosing the disposition of moneys available pursuant to the acts of February 12, 1929, 45 Stat. 1164, and June 13, 1930, 46 Stat. 584, under:

"Interest on Proceeds of Southern Ute Reservation"

	Dr.	Cr.
Interest Warrants	(a) $89,344.16	
Disbursements made for the Southern Ute Band of the Confederated Bands of Ute Indians, as set out in Disbursement Schedule No. 2, pages 28 to 36		(b) $87,596.17
Transferred to: "Interest on Ute 5% Fund, Southern Ute"		(c) 800.00
Amount in the hands of Paul D. Banning, Chief Disbursing Officer, as of June 30, 1951		947.99
	$89,344.16	$89,344.16

* * * *

[Footnotes (a)-(c) omitted]

ABSTRACT NO. 1

Abstract of disbursements made by the United States for the Southern Ute Band of the Confederated Bands of Ute Indians pursuant to the acts of February 20, 1895, 28 Stat. 677; February 12, 1929, 45 Stat. 1164; and June 13, 1930, 46 Stat. 584.

Schedule No.	Name of appropriation or fund	Amount disbursed
1	Proceeds of Southern Ute Reservation	(a) $223,222.93
2	Interest on Proceeds of Southern Ute Reservation	(b) 87,596.17
Total		(c) $310,819.10

* * * *

[Footnotes (a)-(c) omitted]

Excerpts From Petitioner's Exhibit No. 25

GENERAL ACCOUNTING OFFICE
Washington

The following report of the General Accounting Office "Re: Petition of the Confederated Bands of Ute Indians, Court of Claims No. 47567," consisting of 673 pages was prepared in the Indian Tribal Section of the Claims Division of the General Accounting Office. The information and data contained therein which were compiled from the records of the General Accounting Office, as supplemented by certain information obtained from the annual reports, ledgers, etc., of the Office of Indian Affairs, are believed to be true and accurate in all respects and are hereby so certified under the seal of the General Accounting Office this 12th day of March 1951.

/s/ E. B. Smith
Chief, Indian Tribal Section

/s/ A. B. Thomas
Chief, Claims Division

/s/ Frank L. Yates
Acting Comptroller General
of the United States

Seal of
General Accounting
Office

The fund "Indian Moneys, Proceeds of Labor" was established pursuant to the act of March 3, 1883, 22 Stat. 590, which reads, in pertinent part:

> "The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the five civilized tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session."

The act of March 2, 1887, 24 Stat. 463, authorizing disbursements from said funds reads, in pertinent part:

> "That the Secretary of the Interior is hereby authorized to use the money which has been or may hereafter be covered into the Treasury under the provisions of the act approved March third, eighteen hundred and eighty-three, and which is carried on the books of that Department under the caption of "Indian moneys, proceeds of labor," for the benefit of the several tribes on whose account said money was covered in, in such way and for such purposes as in his discretion he may think best, and shall make annually a detailed report thereof to Congress."

The foregoing acts were amended by the act of May 17, 1926, 44 Stat. 560, which reads:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That hereafter all miscellaneous revenues derived from Indian reservations, agencies, and schools, which are not required by existing law to be otherwise disposed of, shall be covered into the Treasury of the United States under the caption "Indian moneys, proceeds of labor," and are hereby made available for expenditure, in the discretion of the Secretary of the Interior, for the benefit of the Indian tribes, agencies, and schools on whose behalf

they are collected, subject, however, to the limitations as to tribal funds, imposed by section 27 of the Act of May 18, 1916 (Thirty-ninth Statutes at Large, page 159).

"SEC. 2. The Act of March 3, 1883 (Twenty-second Statutes at Large, page 590), and the Act of March 2, 1887 (Twenty-fourth Statutes at Large, page 463), are hereby amended in accordance with the foregoing."

The aforesaid acts were further amended by section 2 of the act of June 13, 1930, 46 Stat. 584. Said section reads:

"'SEC. 2. All tribal funds arising under the Act of March 3, 1883 (22 Stat. 590), as amended by the Act of May 17, 1926 (44 Stat. 560), now included in the fund 'Indian Money, Proceeds of Labor,' shall, on and after July 1, 1930, be carried on the books of the Treasury Department in separate accounts for the respective tribes, and all such funds with account balances exceeding $500 shall bear simple interest at the rate of 4 per centum per annum from July 1, 1930.'"

Pursuant to said act of March 3, 1883, as amended, certain classes of receipts pertaining to the Confederated Bands of Ute Indians, and the Uintah Band of Ute Indians were set up under the general heading "Indian Moneys, Proceeds of Labor," and carried on the ledgers of the Department of the Interior under four subsidiaries, viz: "Uintah and Ouray Indians (also carried as "Proceeds of Labor, Uintah and Ouray Indians"); "Southern Ute Indians" (also carried as "Proceeds of Labor, Southern Ute Indians"); "Navajo Springs Indians" (also shown as "Indian Moneys, Proceeds of Labor, Fort Lewis Indians"); and "Ute Mountain Indians" (also carried as "Proceeds of Labor, Ute Mountain Indians"). There are set out on pages 493 to 503 statements disclosing the sources and amounts of receipts under the foregoing headings, and the disposition thereof.

The act of February 12, 1929, 45 Stat. 1164, as amended by the act of June 13, 1930, 46 Stat. 584, provided that simple interest at the rate of 4 per cent per annum should be paid on funds in excess of $500 held in trust by the United States to the credit of an Indian tribe, if interest was not otherwise authorized by law.

Pursuant to said acts, interest was set up under the headings: "Interest on Proceeds of Labor, Southern Ute Indians"; "Interest on Proceeds of Labor, Uintah and Ouray Indians"; and "Interest on Proceeds of Labor, Ute Mountain Indians." There are set out on pages 504 to 506 statements disclosing the disposition of the interest so set up.

With reference to disbursements set out in Statement No. 39 and Disbursement Schedules Nos. 38, 40, and 41, under the caption "Unidentified items," and receipts set out in Statement Nos. 42 and 43, under the caption "Unclassified receipts," it was found impossible to determine the purposes for which the disbursements were made and the items for which the receipts were collected due to the fact that many of the fiscal officers' accounts, covering the period from 1923 to 1926, were damaged by fire, and for the further reason that certain of the records of the General Accounting Office are missing.

STATEMENT NO. 42

Statement disclosing the disposition of moneys available pursuant to the act of March 3, 1883, 22 Stat. 582, 590, from:

"Indian Moneys, Proceeds of Labor, Southern Ute Indians"

	Dr.	Cr.
Miscellaneous receipts	(a) $19,361.97	
Transferred from: "Indian Moneys, Proceeds of Labor (Shebit)"	(b) .16	
Disbursements made for the benefit of the Southern Ute Band of the Confederated Bands of Ute Indians as set out in Disbursement Schedule No. 39, pages 511 to 519.		(c) $13,963.57
Transferred to: "Indian Moneys, Proceeds of Labor, Navajo Springs Indians"		(d) 5,004.78
Balance on the books of the Treasury as of December 31, 1946		393.88
	$19,362.13	$19,362.13

(a) Revenue derived from the following sources:

Advertising fees	$76.70
Coal royalties	112.71
Grazing fees	9,036.74
Interest on official accounts	559.55
Lease of tribal lands	172.32
Payment for damages to telephone line	7.00
Carried forward	$9,965.02

Brought forward	$9,965.02
Payments for railroad right of way	3,290.00
Payment for threshing services	419.80
Rental of livestock	80.41
Rental of school building	12.00
Sale of agricultural implements	75.00
Sale of farm and dairy products	965.46
Sale of iron	110.00
Sale of livestock	1,643.80
Sale of rifles, separator, and typewriter	18.00
Sale of subsistence	60.63
Sale of timber	125.00
Sale of water	570.00
Trespass fees	2,026.85
	$19,361.97

Of this amount $237.75 was disbursed without being deposited and for the balance of $19,124.22, see page 636, Item (a).

(b) This amount was transferred as the result of an erroneous posting.

* * * *

[Footnotes (c), (d) omitted]

STATEMENT NO. 45

Statement disclosing the disposition of moneys available pursuant to the acts of February 12, 1929, 45 Stat. 1164, and June 13, 1930, 46 Stat. 584, under:

"Interest on Proceeds of Labor, Southern Ute Indians"

	Dr.	Cr.
Interest warrants	(a) $219.47	
Balance on the books of the Treasury as of December 31, 1946		$219.47
	$219.47	$219.47

* * * *

[Footnote (a) omitted]

SUPREME COURT OF THE UNITED STATES

No. 515, October Term, 1970

UNITED STATES, PETITIONER

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS

ORDER ALLOWING CERTIORARI—Filed November 16, 1970

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 411053 387